Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVE DORMIRE,
Superintendent,
Jefferson City Correctional Center,

Petitioner,

vs.

JAMES KOSTE,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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17 pp

QUESTIONS PRESENTED

1. **Is automatic reversal of a criminal conviction required by the Sixth and Fourteenth Amendments in a case in which a criminal defendant unsuccessfully sought to have guilty plea counsel removed because the defendant had alleged counsel's ineffectiveness in an earlier case, even though the defendant never proved or even alleged any prejudice in the current case?**

2. **Did a state court act contrary to clearly established federal law as determined by the Supreme Court of the United States, within the meaning of 28 U.S.C. §2254(d)(1), when it rejected a claim that guilty plea counsel was necessarily ineffective because her effectiveness had been challenged by the defendant in an earlier case, based on the reasoning that the defendant did not allege any facts showing how his defense was prejudiced and his plea rendered involuntary in the current case by the actions or inactions of counsel?**

PARTIES TO THE PROCEEDING

Petitioner, Dave Dormire, is the Superintendent of the Jefferson City Correctional Center, Missouri where Respondent, James Koste, is confined. Superintendent Dormire was the respondent in a habeas corpus action the district court and the appellee in the Court of Appeals.

Respondent James Koste is a prisoner in state custody. He was the petitioner in habeas corpus action in the district court and the appellant in the court below.

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For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Superintendent of the Jefferson City Correctional Center respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix "App." A4) is reported at 260 F.3d 872. The opinion of the district court (App. A21) is unreported, as is the opinion of the Missouri Court of Appeals in *Koste v. Missouri*, (App. A37)

JURISDICTION

The Court of Appeals entered its judgment on August 13, 2001. Rehearing was denied on October 26, 2001. The jurisdiction of this Court is involved under 28 U.S.C. §1254(i)

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States Amended VI.

"In all criminal prosecutions the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

Constitution of the United States Amendment XIV Section 1.

". . .nor shall any state deprive any person of life, liberty or property without due process of law. . . ."

28 U.S.C. §2254(d)(1).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly Established Federal law; as determined by the Supreme Court of the United States;

STATEMENT OF THE CASE

This case involves a rejection by the court below of the standard of review set out by this Court for the review of ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668 (1984). The court below has instead applied a rule of automatic reversal if a criminal defendant alleges a personal conflict with counsel, and a trial or guilty plea court does not adequately investigate the complaint prior to proceeding. The decision of the court below expands a rule limited to cases of an attorney representing conflicting interests or parties in the same case to general allegations of conflict between an attorney and his client. The decision of the court below is contrary the decisions of this Court and other circuit courts of appeals.

Additionally, by finding the decision of state court which is essentially consistent with all decisions of this Court is contrary to clearly established federal law as determined by the Supreme Court of the United States the court below has reopened the breach between the circuits on the proper scope of review for habeas corpus actions by state prisoners that was closed by *Williams v. Taylor*, 529 U.S. 362 (2000).

A. Respondent's Allegations at his Guilty Plea and Sentencing

On November 13, 1995 James Koste pled guilty to five counts of sodomizing a child under fourteen years of age and was sentenced to five concurrent terms of thirty years imprisonment without the possibility of probation or parole (App. A21). At the time Koste committed these offenses he was on probation for convictions for rape and sodomy for which he had been sentenced to life in prison, but the sentences had not been executed and he had been placed on probation.

Before his guilty plea on the five sodomy counts, Koste filed a written *pro se* motion alleging a conflict existed between himself and his attorney Johnson, a public defender, because he had filed a post-conviction relief motion charging ineffectiveness against

"agenced attorneys said office" challenging the earlier convictions for which he had been placed on probation (App. A62). He was represented by different public defenders , Grunanger and Lundt, in the earlier case (App. A66).

After sentencing Koste again stated that he felt he had a conflict with appointed counsel for the reasons set out in his written motion (App. A82). The trial court rejected the claim stating "The Court is not going to try that PCR as being no legal suit against Ms. Johnson [guilty plea counsel in the current case] and the court herein denies that" (App. A83).

B. **The Court Opinions in This Case**

Koste alleged in the Missouri Court of Appeals that his guilty plea counsel had a conflict of interest because he had challenged her effectiveness in the post-conviction motion challenging his earlier convictions[1] (App. A45). The Missouri Court of Appeals rejected this ineffectiveness claim because Koste did not allege facts showing how his defense was prejudiced and his guilty plea was rendered involuntary by the alleged actions or inactions of trial counsel and that "[t]hese conclusory allegations do not show how the matters complained of resulted in prejudice to his interests" (App. A45).

The district court left the decision undisturbed in habeas corpus review, finding that the determination that Koste did not plead facts showing how he was prejudiced by the alleged conflict was a reasonable determination of the facts under 28 U.S.C. §2254(d)(2) and the decision was "not contrary to clearly established federal law" under 28 U.S.C. §2254(d)(1) (App. A31).

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[1]Although it appears from the record that Koste actually alleged to the guilty plea court a conflict based on representation by the same office, as opposed to personal representation in the earlier case, all subsequent analysis by courts and parties has treated the claim as one of conflict based on personal representation in the earlier case. For practical purposes, the legal analysis would seem to be the same.

The Court of Appeals however reversed the district court, finding that the determination of the Missouri Court of Appeals that Koste must show some prejudice from the alleged conflict of interest was "contrary to" the decision of the United States Supreme Court in *Holloway v. Arkansas*, 435 U.S. 475 (1978) and that the guilty plea court's failure to make further inquiry into the alleged conflict of interest required automatic reversal of the convictions regardless of Koste's failure to show any prejudice resulting from the alleged conflict.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court below that a conviction must be automatically reversed without any showing of prejudice in a case in which a criminal defendant has alleged a conflict based on his own accusations that counsel was ineffective in an earlier case is contrary to the decisions of this Court and other circuit courts of appeals.

There is a special rule for demonstrating ineffective assistance of counsel in cases in which an attorney actually represents conflicting parties or interests in a criminal trial: A defendant need only show the actual representation of conflicting interests in the same proceeding and that this prejudiced representation. Automatic reversal is called for in a case in which trial counsel is directed to represent multiple defendants but informs the trial court he cannot do so due to the conflicting interests of his clients but counsel, without investigation of his allegations, is directed to proceed anyway. This is a constructive denial of counsel to the defendants. In all other cases, that do not involve an actual or constructive denial of counsel, this Court and other circuit courts follow the general rule, confirmed in *Strickland*, that a criminal defendant must demonstrate that incompetence created a reasonable probability the outcome of the proceeding was changed.

The Missouri Court of Appeals decided Koste's case using the general rule requiring a showing of prejudice. But the Eighth Circuit Court did not accept this decision, instead expending the scope of the special rule of automatic reversal to cover a case in which a counsel did not represent conflicting interests or parties in the same proceeding. This expansion conflicts with the decision of this Court and other circuit courts of appeals.

The origins of the special rule go back to the initial dual representation case *Glasser v. United States*, 315 U.S. 60 (1942). There this Court found a denial of the right to counsel occurred in a dual representation case in which a defendant had opposed dual representation and his defense in a close case was hampered by not

having his own counsel in the case. Relying on *Glasser*, this Court, in *Holloway v. Arkansas*, 435 U.S. 475 (1978), found a denial of the right to counsel occurred when a lawyer assigned to represent multiple co-defendants told the trial court in his role as an officer of the court that their defenses conflicted and he could not adequately represent all of them, but the trial court without investigating the claim forced him to proceed. In *Holloway*, this Court required the automatic reversal of a conviction, without a showing of prejudice, due to the trial court's failure to investigate counsel's assertions as an officer of the court that he could not proceed adequately with multiple representation due to his clients' conflicting interests and the resulting constructive deprivation of counsel. *Id.* As this Court stated in *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980) "*Holloway* requires state trial courts to investigate timely objections to multiple representation."

Holloway is a case that deals specifically with the unique situation of an attorney in a multiple representation cases, in which a trial judge has refused to inquire into an alleged actual conflict. If such an inquiry were made the proper standard of review would be to determine if counsel was actively representing conflicting interests. If no complaint is made about a conflict, prior to trial, a defendant must show representation of actually conflicting interests and an adverse impact on the defense to show ineffectiveness. *Cuyler v. Sullivan*, 446 U.S. 358-350.

In *Strickland v. Washington*, 466 U.S. 668, 692 (1984), this Court reiterated the *Cuyler* rule in a conflict of interest case that prejudice may only be presumed if a criminal defendant meets a burden of demonstrating that counsel actively represented conflicting interests in a case and this actual conflict adversely affected the representation, before going on to point out that the general rule is that to show ineffectiveness a defendant must prove incompetence by counsel and a reasonable probability this incompetence changed the outcome of the proceeding. The rules of *Cuyler* and *Holloway* apply only in cases in which an attorney represents conflicting parties or interests in the same proceeding. Nothing in this Court's precedents supports the idea that an alleged personal conflict between a criminal

defendant and his attorney requires automatic reversal without a showing of prejudice if a trial court or guilty plea court did not adequately investigate the alleged conflict. Yet the court below held in this case that automatic reversal is dictated by this Court's precedents and granted a writ of habeas corpus despite state court findings that no prejudice had been shown or even pled. The holding of the court below cannot be reconciled with this Court's precedents.

That holding is also in clear conflict with the jurisprudence of other circuit courts of appeals. For instance in *Beets v. Collins*, 65 F.3d 1258, 1265 (5th Cir. 1995) (en banc), the United States Court of Appeals for the Fifth Circuit, sitting en ban found that *Strickland* analysis must be used rather than presumed prejudiced except in cases of multiple representation. Other circuit courts of appeals while not taking as broad a position as the Fifth Circuit that conflict short of multiple representation can never justify divergence from the *Strickland* standard, have held that the type of conflict alleged in this case must be reviewed under the *Strickland* standard. Some examples include the following: *United States v. O'Neil*, 118 F.3d 65, 72 (2nd Cir. 1997) (civil suit between attorney and criminal defendant did not remove the case from *Strickland* analysis); *United States v. White*, 174 F.3d 290, 294-297 (2nd Cir. 1999) (complaints about counsel's performance did not create conflict of interest to be evaluated outside the *Strickland* framework); *United States v. Moree*, 220 F.3d 65 (2nd Cir. 2000) (general *Strickland* standard used to review alleged conflict based on accusation of counsel's ineffectiveness in earlier representation); *United States v. Burnes*, 990 F.3d 1426, 1438 (4th Cir. 1993) (rejecting claim that bar complaint made against counsel by a defendant prior to trial stated a claim of conflict of interest and noting that the United States Supreme Court had never suggested that conflict between a defendant and a lawyer in a separate proceeding requires reversal of a conviction); *Hale v. Gibson*, 227 F.3d 1298, 1312-1313 (10th Cir. 1995) (interests of client and attorney must be divergent in current litigation for a conflict taking the case outside the *Strickland* standard of review to exist, and such a conflict was not created by counsel's belief that the defendant had burglarized his office).

The decision of the court below that automatic reversal of a conviction is appropriate, based on an allegation by a criminal defendant that his counsel was ineffective in an earlier case is contrary to the jurisprudence of this Court and creates a conflict between the circuit courts of appeals on a matter of critical importance.

II. The decision of the court below interpreting the "contrary to" language of 28 U.S.C. §2254(d)(1) is incompatible with the decision of this Court in *Williams v. Taylor*, 529 U.S. 362 (2001) after similar confusion and threatens to sow the confusion concerning the standard of review to be used in habeas cases that was eliminated by this Court in the *Williams v. Taylor* decision.

The United States Court of Appeals for the Eighth Circuit has read the "contrary to" clause of 28 U.S.C. §2254(d)(1) in a way that significantly broadens the scope of review of state court decisions in criminal cases. That reading is contrary to recent jurisprudence and threatens to reopen a breach between the circuits that this Court recently closed by giving a narrow and very specific definition to the "contrary to" clause.

Section §2254(d)(1) defines when a writ of habeas corpus may be granted on an issue that turns on a question of federal law that has been decided on the merits by a state court. It states that an application for habeas corpus by a prisoner in state custody shall not be granted on any claim adjudicated on the merits in a state court unless the adjudication of the claim "resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" (emphasis added).

In *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000), this Court resolved a conflict between the circuit courts of appeals by defining the "contrary to" language of the statute as follows: "Under the contrary to clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on materially indistinguishable facts." This Court pointed out in *Williams* that "contrary" is commonly understood to mean "diametrically different" "opposite in character or nature or mutually opposed" and that "a run of the mill" state court decision applying the correct legal rule does not fit within the "contrary to" clause. *Id.* at 405-406.

Before this Court's decision in *Williams v. Taylor*, some circuit courts of appeals viewed the "contrary to" clause as permitting federal habeas courts to conduct *de novo* review of state court merits decisions on purely legally questions. *Williams v. Taylor*, 529 U.S. at 384. Other courts correctly understood the clause to have the narrow meaning this Court defined in *Williams v. Taylor*. *Id.* at 402. The holding of the court below has, without openly acknowledging it, accepted the type of *de novo* review this Court rejected in *Williams v. Taylor*. The state court decision rejected by the court below was not factually indistinguishable from any case in which this Court reached a different result nor did the state court decision reject any rule of law announced by this Court.

The Missouri Court of Appeals in this case rejected Koste's claim of a conflict interest, arising from his allegation that counsel had been ineffective in an earlier case, because Koste did not allege or show any prejudice in the current case arising from the alleged conflict. The court below found this decision to be "contrary to" *Holloway v. Arkansas*, 435 U.S. 475 (1978) which the court below found dictated automatic reversal of the convictions without any specific showing of prejudice.

But *Holloway* did not go nearly that far. There an attorney was appointed to represent three codefendants. He informed the court that because of confidential information received from them he knew they had conflicting interests at trial. The trial court nevertheless ignored the representation of counsel forcing him to proceed and constructively denying the criminal defendants counsel, mandating automatic reversal. The fact pattern of *Holloway* is easily distinguishable from Koste's case. Koste alleged a personal conflict with counsel, but not representation of actually conflicting interests in the same case. The rule of law of *Holloway* can be fairly stated only as that automatic reversal is necessary if counsel, in a multiple representation case informs the court that his clients have conflicting interests, yet a trial court forces him to proceed, without further inquiry into the matter – a rule that does not cover Koste's case.

There is no plausible way to find the decision of the Missouri

Court of Appeals, affirming Koste's conviction to be "contrary to" *Holloway v. Arkansas* without stretching this Court's definition in *Williams v. Taylor* beyond recognition. The decision of the court below in practice ignores this Court's teaching in *Williams v. Taylor* and reimposes *de novo* federal habeas review of state criminal convictions. This action exceeds the authority provided to the court below by Congress through 28 U.S.C. §2254 and should be corrected on certiorari review by this Court.

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APPENDIX TO PETITION

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 00-3791

James Koste,	*	
	*	
Appellant,	*	Order Denying Petition for
	*	Rehearing and for
	*	Rehearing En Banc
vs.	*	
	*	
Dave Dormire,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judges Bowman, Loken, Hansen, and Riley would grant the petition. (5128-010199).

October 26, 2001

Order Entered at the Direction of the Court;

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3791

James Koste,	*	
	*	
Appellant,	*	
	*	Appeal from
	*	The United
	*	District Court
	*	of the Eastern
vs.	*	District of
	*	Missouri
	*	
Dave Dormire,	*	
	*	
Appellee.	*	

Submitted: June 11, 2001

Filed: August 13, 2001

Before McMILLIAN, RICHARD S. ARNOLD, and HALL,[1] Circuit Judges.

McMILLIAN, Circuit Judge.

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[1]The Honorable Cynthia Holcomb Hall, United States Senior Circuit Judge for the Ninth circuit, sitting by designation.

James Koste appeals from a final judgment entered in the United States District Court for the Eastern District of Missouri denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See Koste v. Dormire*, No. 4:98CV1709 (E.D. Mo. Sept. 25, 2000) (memorandum and order) (hereinafter "slip op."). For reversal, Koste argues that (1) he is entitled to habeas corpus relief because the state trial court failed to adequately inquire into his allegation that his trial attorney had a conflict of interest and (2) assuming he was required to show prejudice resulting from his attorney's conflict of interest, he met that burden. Koste also argues that (3) he was entitled to an evidentiary hearing in the district court on his claim that his trial attorney was ineffective for failing to obtain a mental examination prior to his guilty pleas. For the reasons stated below, we reverse the judgment of the district court and remand this case to the district court for proceedings consistent with this opinion.

The district court had jurisdiction pursuant to 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. § 2253(a). The notice of appeal was timely filed pursuant to Fed.R.App.P. 4(a).

Background

On May 24, 1994, Koste was charged by indictment in the City of St. Louis with five identical counts of sodomy with a child under the age of fourteen in violation of Mo.Rev.Stat. § 566.060; all the counts involved the same child. On the day of trial, pursuant to a plea agreement, Koste entered a plea of guilty to all five charges. The plea agreement provided that he would plead guilty and the court would sentence him to 30 years without parole on each of the five counts, such sentences to run concurrently with each other and with the life sentence he

was then serving.[2]

At Koste's plea hearing in the Circuit Court of the City of St. Louis, the trial judge asked if Koste authorized his attorney to say he was pleading guilty, to which Koste said he did. *See* Transcript of Nov. 13, 1995, proceedings in Circuit Court of the City of St. Louis (hereinafter "Tr.") at 2. The trial judge further asked if Koste was pleading guilty because he was guilty, and Koste said he was "taking the 5th," but that he would plead guilty. *See id.* When Koste repeated that he would not say whether he was guilty, the trial judge responded that Koste would have to go to trial and face consecutive time. The trial judge then asked Koste if he was voluntarily entering his plea of guilty, and Koste responded "yes." *See id.* at 3-4. The trial judge also asked Koste if he was "crazy." Koste responded by stating "not that I know of" and that he knew what he was doing. *See id.* at 4. The trial judge then accepted Koste's guilty plea.

After this verbal exchange, the prosecutor summarized for the court what the evidence would show as to each count if the matter were tried. In particular, the prosecutor advised the court that the prosecutor would prove, for each count, that Koste engaged in the described deviate sexual acts between January 1, 1994, and February 24, 1994. Koste admitted to the court that he had committed the acts described by the prosecutor. *See id.* at 6-7. The trial judge then found that Koste was a persistent sexual offender because he had previously been convicted of or plead guilty to a felony of forcible rape of a child under fourteen for which crime he was currently serving a sentence of life imprisonment. The trial judge found Koste

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[2]On September 26, 1992, in the Circuit Court of the City of St. Louis, Koste was found guilty of rape of a child less than fourteen years of age and received a life sentence.

guilty on all five counts, sentencing him to concurrent terms of 30 years without probation or parole, pursuant to the terms of his plea agreement. *See id.* at 7-11. Koste did not file a direct appeal from his conviction and sentence.

After Koste was sentenced, the trial judge asked him if his attorney represented him throughout the proceedings, and Koste responded "yes," but he said that he did not have sufficient time to discuss his case with the attorney; he said the attorney visited him one time in jail for five minutes. The trial judge said that he, meaning himself, "stayed here last night to afford [Koste] an opportunity to spend two or three hours with [his] lawyer; that [the trial judge] brought [Koste] to court early so [Koste] could be with [his] lawyer." *Id.* at 13. Koste acknowledged that his lawyer visited him in jail once and that his attorney did not make any threats or promises to encourage him to enter a plea of guilty, but Koste also said that the attorney did not do everything he asked the attorney to do and that he was not satisfied with his attorney. *See id.* at 13-14. The attorney acknowledged that she and Koste had a dispute as to what witnesses would be called and told the court that she gave an investigator instructions regarding witnesses. The trial judge responded that he was "not going to get involved with trial technique strategy" and that he "saw [the attorney's] investigator in the court room and that the attorney was giving him some directions." *Id.* at 14.

Koste further informed the trial judge that his attorney had a conflict of interest due to an appeal in another case. *See id.* The trial judge responded as follows:

The court found that none exist[s]. The court found that we selected this jury, we let you listen to the tape, the video tape and it was not raised until this morning that I was informed that you had a suit against them, but you had filed a PCR . . . . The

court is not going to try that PCR as being no legal suite against [the attorney] and the court herein denies that. *Id.* at 14-15.

The trial judge then asked Koste if he had anything else to say, and Koste responded that he felt his "due process rights [had] been denied." *Id.* at 15. The trial judge then found that Koste had "no probable cause for ineffective assistance of counsel," stating that his attorney had "tried a number of cases in [that] division," had "been trying cases for a number of years," and that "the court [had] always found her to be a diligent attorney." *Id.* at 16.

STATE POST-CONVICTION RELIEF PROCEEDINGS

Koste filed a *pro se* motion to vacate his conviction pursuant to Missouri Rules of Criminal Procedure, Rule 24.035.[3] Counsel was appointed and filed an amended motion alleging, among other things, that Koste's guilty plea was involuntary, that he was denied effective assistance of counsel because his trial counsel failed to conduct a thorough investigation and failed to seek a psychiatric examination of him, and that his rights were violated during the trial court's examination of him pursuant to

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[3]Rule 24.035 provides in relevant part that:

(a) Nature of Remedy - Rules of Civil Procedure Apply. A person convicted of a felony on a plea of guilty . . . who claims that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel . . . may seek relief in the sentencing court pursuant to the provision of Rule 24.035.

. . . .

(h) Hearing Not Required, When. If the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held.

Missouri Rules of Criminal Procedure, Rule 29.07(b)(4). Rule 29.07(b)(4) requires that a sentencing court, at the conclusion of final sentencing, examine a defendant on the record regarding the assistance of counsel received. Koste also requested a hearing on these issues. The motion court denied Koste's Rule 24.035 motion and further denied his request for a hearing. *See Koste v. State*, PCR No. 3473 (Mo. Cir. Ct. May 3, 1996).

Koste appealed the denial of his motion for post-conviction relief to the Missouri Court of Appeals. The Missouri appellate court held that the judgment of the motion court was based on findings of fact that were not clearly erroneous and that there were no errors of flaw, and affirmed the judgment of the motion court. *See Koste v. State*, No. 71817 (Mo. Ct. App. Jan. 13, 1998) (order). In regard to Koste's contention that the motion court erred in failing to conduct a hearing to determine whether his trial counsel refused to pursue a mental examination, the Missouri appellate court concluded that Koste's counsel had no absolute or routine duty to initiate an independent investigation of Koste's mental condition. *See Koste v. State*, No. 71817, slip op. at 7 (Mo. Ct. App. Jan. 13, 1998) (memorandum supplementing order). In regard to Koste's allegation that his guilty plea was not voluntary, the Missouri appellate court said that because Koste failed to include in his motion for post-conviction relief contentions made in support of this position that he was intimidated by the trial judge into pleading guilty and that the trial judge continued with the plea hearing after Koste announced his desire to go to trial, consideration of these matters was procedurally barred. The Missouri appellate court considered Koste's contention that his plea was not voluntary due to ineffective assistance of counsel. However, although Koste asserted that he had ineffective assistance of counsel because his trial attorney (1) did not spend sufficient time with him to discuss his case, (2) disagreed with him regarding witnesses, and (3) had a conflict of interest, the

state appellate court only considered the claim regarding the time spent with Koste because the other two allegations were procedurally waived as they were not included in the motion for post-conviction relief. *See id.* at 4-5. The Missouri appellate court concluded that the motion court did not clearly err in denying Koste an evidentiary hearing on these matters regarding the sufficiency of the time Koste's counsel spent with him. *See id.* at 6.

In regard to Koste's separate claim that the trial judge erred in refusing to conduct a hearing to determine whether his counsel had a conflict of interest, the Missouri appellate court found that Koste "failed to allege facts showing how his defense was prejudiced and his plea was rendered involuntary due to the alleged actions or inactions of his trial counsel because of the alleged conflict of interest." *Id.* at 7. The Missouri appellate court further found that Koste only argued "that the alleged conflict caused his counsel to inadequately prepare for trial and also deprived him of conflict-free advice" and concluded that Koste's conclusory assertions did not show how the matters of which he complained "resulted in prejudice to his interests." *Id.* Therefore, the state appellate court concluded that the motion court did not clearly err in denying Koste an evidentiary hearing on his allegation that the trial judge erred in refusing to conduct a hearing to determine whether Koste's trial counsel had a conflict of interest. The state appellate court reached this conclusion based on its finding that the "record conclusively establishe[d] that [Koste's] plea was knowingly and voluntarily entered and that he did not meet his initial burden of pleading facts, not conclusions, not refuted by the record which entitle him to relief." *Id.* at 7-8.

FEDERAL HABEAS PROCEEDINGS

Having exhausted his available state remedies, Koste

filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court alleging, among other things, that he was denied his right to effective assistance of counsel. The district court denied the petition. In regard to Koste's claim that his trial counsel was ineffective for failing to pursue a mental evaluation, the district court concluded that the motion court's decision was not contrary to clearly established federal law nor was it based on an unreasonable determination of the facts in light of the evidence presented. *See* slip op. at 6-8. In regard to Koste's claim that he received ineffective assistance of trial counsel because his counsel was acting under a conflict of interest during his guilty plea proceedings, the district court cited the decision of the Missouri Court of Appeals stating that Koste made "conclusory assertions [which did] not show how the matters complained of resulted in prejudice to his interests." *Id.* at 9. Citing 28 U.S.C. § 2254(d)(2), the district court then concluded that the state appellate court's decision was not based on an unreasonable determination of the facts in light of the evidence presented. *See id.* at 6-8.[4] This appeal followed.

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[4]The district court also determined that Koste's claim that he was denied due process because of the failure of the motion court to conduct an evidentiary hearing on his Rule 24.035 motion, was not cognizable in a federal habeas petition because 28 U.S.Cg14. § 2254 only authorizes federal courts to review the constitutionality of a state criminal conviction, not infirmities in a state post-conviction relief proceeding. *See Koste v. Dormire*, No. 4:98CV1709JCH, slip op. at 3 (E.D. Mo. Sept. 25, 2000) (memorandum and order). The district court further agreed with the state appellate court that Koste's claims regarding the voluntariness of his plea were procedurally barred because he did not raise them on direct appeal or in his post-conviction motion and the defense was not excused by cause or prejudice. *See id.* at 4. In regard to Koste's claims that his plea was not voluntary due to fear of going to trial with unprepared counsel the district court concluded that the motion court's decision was not based on an unreasonable determination of the facts in light of the evidence. *See id.* at 6.

Discussion

In his first and second of his claims certified for appeal, Koste argues that the district court erred in denying his petition because the state trial court failed to adequately inquire into his trial counsel's conflict of interest when a potential conflict was brought to the court's attention and that, assuming that he was required to show prejudice by virtue of his trial attorney's conflict of interest, he sustained this burden. Koste also argues, for the third of his claims certified for appeal, that he is entitled to an evidentiary hearing in the district court on his claim that his trial attorney was ineffective for failing to obtain a mental examination prior to his entering a guilty plea.

We first consider the standard of review applicable to the issues raised by Koste on appeal to this court. In *Williams v. Taylor*, 529 U.S. 363, 412-13 (2000) (*Williams*), the United States Supreme Court set forth the requirements for federal courts to grant writs of habeas corpus to state prisoners under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 ("AEDPA"). Justice O'Connor, writing for the majority, explained that:

§ 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court

decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. 412-13. This "standard of review under the AEDPA is a heightened one" because *Williams*, 529 U.S. 411, further holds that a "federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Copeland v. Washington*, 232 F.3d 969, 973 (8th Cir. 2000) (*Copeland*), cert. denied, 121 S.Ct. 1968 (2001).

In *Williams*, 529 U.S. at 405-06, Justice O'Connor, writing for the majority, further explained that a state-court decision is "contrary to" the Court's clearly established precedent if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Court's] precedent." Justice O'Connor rejected an "expansive" interpretation of § 2254(d)(1) which would permit a federal court to grant relief in cases where "a state court's application of clearly established federal law was incorrect." *Id.* at 407.

In regard to the meaning of the "unreasonable application of" prong of § 2254(d)(1), Justice O'Connor held that a state court decision can be an unreasonable application of Supreme Court precedent where it "identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or where it

"unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* In summary, "when a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case, a federal court applying §22 54(d)(1) may conclude that the state-court decision falls within that provision's 'unreasonable application' clause." *Id.* at 409. "To the extent that 'inferior' federal courts [including this court] have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness of the state court's resolution of the disputed issue." *Atley v. Ault*, 191 F.3d 865, 871 (8th Cir. 1999) (*Atley*).

In analyzing the "contrary to" prong of § 2254(d)(1), we must consider whether the facts of the matter before us are materially indistinguishable from a Supreme Court case, and if they are, whether the state courts arrived at a result different from the Supreme Court's precedent. We, therefore, first consider whether there are Supreme Court decisions addressing the issue raised by Koste that the trial court failed to adequately inquire into his assertion that his trial counsel had a conflict of interest, thus denying him effective assistance of counsel. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . To have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Supreme Court has recognized that this right guaranteed by the Sixth Amendment includes the "right to representation that is free from conflicts of interest." *Atley*, 191 F.3d at 869 (citing *Wood*, 450 U.S. at 271) (other citations omitted). "When burdened by a conflict of interest, counsel 'breaches the duty of loyalty, perhaps the most basis of counsel's duties' and, therefore, fails to provide effective assistance of counsel." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (*Strickland*)). In *Atley*, 191 F.3d at 870, this court held that *Cuyler v. Sullivan*, 446 U.S.

335, 346 (1980), requires that, when a defendant makes an objection at or before trial to counsel's representation, the trial court has an obligation under *Holloway v. Arkansas*, 435 U.S. 475 (1978) (*Holloway*), "to determine whether an actual conflict exists." This court further held that *Holloway* required automatic reversal of a conviction "when a trial court fails to discharge its constitutional duty to determine whether the defendant is receiving assistance of counsel unburdened by a conflict of interest" because prejudice is presumed under such circumstances. *Atley*, 191 F.3d at 870 (citing *Holloway*, 435 U.S. at 489; *Wood v. Georgia*, 450 U.S. 261, 272 n. 18 (1981) (*Wood*).

Although *Holloway* and *Cuyler* each involved an alleged conflict of interest due to counsel's joint representation of co-defendants, the rule announced in these Supreme court cases "is not limited to [joint representation] situations." *Atley*, 191 F.3d at 870 n. 4 (citing *Wood*, 450 U.S. at 268-74 (holding the trial court violated its duty to inquire into the conflict created by the fact that the defendant's lawyer was hired and paid by a third party); *United States v. Horton*, 845 F.2d 1414, 1418-20 (7th Cir. 1988) (*Horton*) (applying *Holloway* and *Cuyler* "to a defendant's claim that his attorney's application for a position as a United States Attorney created a conflict of interest that deprived him of his Sixth Amendment right")).

Koste claims that when he notified the trial court of a potential conflict of interest with his attorney, that court had a constitutional duty to conduct an adequate inquiry and that the failure to do so requires reversal. Considering the above described federal law as determined by the Supreme Court, we hold that Koste's claim falls squarely within the parameters of the Supreme Court's holding in *Holloway*. *See Atley*, 191 F.3d at 870. *Cf. Owsley v. Bowersox*, 234 F.3d 1055, 1057 (8th Cir. 2000) (holding that *Holloway* was not applicable where state

trial court refused to appoint another attorney for defendant for the purpose of moving for substitute counsel). Therefore, pursuant to *Williams*, 529 U.S. at 405-06, we next consider whether the Missouri appellate court's decision in the matter before us is "contrary to" federal law is determined by the Supreme Court in *Holloway*.

In *Atley*, 191 F.3d at 872, this court recognized that "the nature of the factual inquiry required by *Holloway* is necessarily case-specific, and that, in some cases, no inquiry may be required because all of the relevant facts have been disclosed to the court." In the matter under consideration, after sentencing, the trial judge asked Koste whether he was satisfied with his attorney, and Koste responded that his attorney had a conflict of interest because the attorney represented him in another case where she provided constitutionally ineffective assistance of counsel and that this allegedly ineffective assistance of counsel was the subject of a pending motion for post-conviction relief. The trial judge did not require into the matter further nor did he give Koste the opportunity to present any factual or legal basis for his allegation. Rather, the trial judge simply responded that the court was not going to try the pending post-conviction relief motion and was, therefore, denying Koste's contention of a conflict. *See* Tr. at 15.

The Missouri motion court held that the Koste's right to counsel was not violated by the trial court during the trial judge's examination of him pursuant to Missouri Rule 29.07(b)(4). Upon considering Koste's allegation of his trial attorney's conflict of interest, the Missouri appellate court specifically relied on its finding that Koste's conclusory assertions did not show actual prejudice to his interests and required that he establish actual prejudice in order to obtain post-conviction relief on his claim of denial of effective representation due to his attorney's conflict. *Koste v. State*, slip

op. at 7. However, according to clearly established federal law, actual prejudice must be established only where a defendant fails to make a timely objection. *See Cuyler*, 446 U.S. at 348; *Atley*, 191 F.3d at 869. Therefore, we hold that the state court's decision requiring Koste to show actual prejudice in order to prevail on his conflict of interest claim for post-conviction relief is "contrary to" clearly established federal law as determined by Supreme Court precedent.[5]

We note that in reaching its conclusion that Koste was not entitled to relief on the basis of his alleged conflict of interest with his attorney, the district court quoted the findings of the Missouri appellate court and said that the state court conclusion withstood the scrutiny imposed by § 2254(d)(2), because it did not result in a "unreasonable determination of the facts in light of the evidence presented in the State court proceedings." Slip op. at 9. Thus, the district court did not rely on either the "contrary to" or the "unreasonable application of" prongs of § 2254(d)(1), but rather relied on § 2254(d)(2)'s provision that a federal court shall not grant habeas corpus relief unless the state decision was based on an "unreasonable determination of the facts in light of the evidence presented." However, as we hold that the state court's decision was "contrary to" federal law as established by the Supreme Court, we need not reach the issue of whether the district court properly denied habeas relief based on § 2254(d)(2).

Appropriate Relief

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[5]In *Atley v. Ault*, 191 F.3d 865 (8th Cir. 1999), because the state court sought to apply clearly established Supreme Court precedent but did so unreasonably, this court concluded that the state supreme court's decision "was an unreasonable application of clearly established Supreme Court precedent." *Atley*, 191 F.3d at 872.

Having determined that the Missouri appellate court's decision is "contrary to" clearly established federal law within the meaning of § 2254(d)(1), we address the issue of appropriate relief. *Holloway* makes it clear that a failure to conduct an adequate inquiry into a defendant's claim of his attorney's conflict of interest constitutes a violation of the Sixth Amendment right to counsel. *See Atley*, 191 F.3d at 874. Such a violation, according to *Holloway*, is a constitutional defect which entitles a petitioner to habeas relief and which requires reversal of a conviction. *See id.* Because *Holloway* presumes prejudice to a petitioner where the trial court fails to adequately explore the possibility of a timely raised conflict of interest, we hold that Koste "has satisfied his burden under *Strickland* to show that he was deprived of effective assistance of counsel in violation of the Sixth Amendment." *Atley*, 191 F.3d at 874 (citing *Strickland*, 466 U.S. at 692).

Conclusion

Accordingly, we reverse the judgment of the district court and remand this case to district court for proceedings consistent with this opinion. The writ shall issue unless, within 90 days from the issuance of this decision, the state commences proceedings to retry Koste. Because we are reversing on other grounds, we find it unnecessary to reach the issue of whether Koste is entitled to habeas relief based on his allegation that his trial counsel failed to obtain a mental examination.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JAMES KOSTE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 4:98CV1709 JCH
	)	
DAVE DORMIRE,	)	
	)	
Respondent.	)	

CERTIFICATE OF APPEALABILITY

In accordance with the Memorandum and Order entered this day and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Petitioner is **GRANTED** a Certificate of Appealability to appeal Grounds 4 and 5 (as described in the Memorandum and Order incorporated herein) to the United States Court of Appeals for the Eighth Circuit.

Dated this 25th day of September, 2000.

Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JAMES KOSTE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 4:98CV1709 JCH
	)	
DAVE DORMIRE,	)	
	)	
Respondent.	)	

ORDER OF DISMISSAL

In accordance with the Memorandum and Order entered this day and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. No. 6) is **DISMISSED**.

Dated this 25th day of September, 2000.

Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JAMES KOSTE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 4:98CV1709 JCH
	)	
DAVE DORMIRE,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Missouri state prisoner James Koste's *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter is fully briefed and ready for disposition.

On November 13, 1995, Petitioner pleaded guilty in the Circuit Court of St. Louis City, Missouri, to five counts of sodomy of a child under age fourteen (Respondent's Exh. 6, attached PP. 1-2). Petitioner was sentenced as a persistent sexual offender to five terms of thirty years' imprisonment, to run concurrently with each other and concurrently with a previous life sentence Petitioner received in another matter (Respondent's Exh. 6, attached P. 2). Petitioner then filed a motion for post-conviction relief under Missouri Supreme Court Rule 24.035, which the motion court denied without conducting an evidentiary hearing (Respondent's Exh. 2). The Missouri Court of Appeals affirmed the denial of Petitioner's motion for post-conviction relief on January 13, 1998 (Respondent's Exh.

6).

Petitioner is currently incarcerated at the Jefferson City Correctional Center in Jefferson City, Missouri. In construing the instant petition liberally, the Court finds that Petitioner raises the following claims for relief:

(1) That Petitioner pled guilty involuntarily as a result of his fear of going to trial with unprepared counsel;

(2) That Petitioner pled guilty involuntarily as a result of intimidation by the trial court judge;

(3) That Petitioner pled guilty involuntarily as a result of the trial court's insistence that Petitioner continue with the plea hearing even after he announced his desire to go to trial;

(4) That Petitioner received ineffective assistance of counsel in that counsel failed to pursue a mental evaluation of Petitioner;

(5) That Petitioner received ineffective assistance of counsel in that counsel was acting under a conflict o f interest; and

(6) That Petitioner was denied an evidentiary hearing on his Rule 24.035 motion.

The Court will address the claims in turn.

I. Exhaustion Analysis

A petitioner must exhaust his state law remedies before the federal court can address the merits of his claims in a habeas petition. 28 U.S.C. § 2254(b). The Court must first look to see

whether the federal constitutional dimensions of the petitioner's claims have been fairly presented to the state court. *Smittie v. Lockhart*, 843 F.2d 295, 296 (8th Cir. 1988). If not, the petitioner may still meet the exhaustion requirement if there are no currently available non-futile state remedies by which he could present his claims to the state court. *Id.* When the petitioner's claims are deemed exhausted because he has no available state court remedy, the federal court still cannot reach the merits of the claims unless the petitioner demonstrates adequate cause to excuse his state court default and actual prejudice resulting from the default. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Keithley v. Hopkins*, 43 F.3d 1216, 1217 (8th Cir.), cert. denied, 515 U.S. 1163 (1995); *Stokes v. Armontrout*, 893 F.2d 152, 155 (8th Cir. 1989). Every habeas ground advanced by the petitioner must survive this exhaustion analysis, or the petition must be dismissed. *Rose v. Lundy*, 455 U.S. 509 (1982).

Respondent concedes that Petitioner has exhausted his available state remedies, and the record demonstrates that Petitioner's claims are exhausted either because they have been properly raised in the state courts or because Petitioner has no available non-futile state remedies by which he could present his claims.

II. Non-Cognizable Claim

Federal habeas relief is available to a state prisoner only on the ground that he is in custody in violation of a constitutional or federal statutory right. *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir.), cert. denied, 495 U.S. 936 (1990); 28 U.S.C. § 2254(a). Claims that do not reach constitutional magnitude cannot be addressed in a petition for habeas corpus. *Carter v. Armontrout*, 929 F.2d 1294, 1296 (8th Cir. 1991).

In his sixth claim for relief, Petitioner claims that he was denied due process in that the post-conviction motion court failed to have an evidentiary hearing on his Rule 24.035 motion (§ 2254 Motion, attached PP. 8, 13, 19). Section 2254, however, "only authorizes federal courts to review the constitutionality of a state criminal conviction, not infirmities in a state post-conviction relief proceeding." *Williams-Bey*, 894 F.2d at 317. *See also Williams v. State of Missouri*, 640 F.2d 140, 143-44 (8th Cir.), cert. denied, 451 U.S. 990 (1981). Petitioner's claim that the post-conviction motion court failed to have a hearing on his Rule 24.035 motion is collateral to his conviction and detention, and is therefore not cognizable in a federal habeas petition. *Williams-Bey*, 894 F.2d at 317.

Petitioner's sixth claim for relief will therefore be denied.

III. Procedural Default[1]

In Ground 2 of his petition, Petitioner alleges that he plead guilty involuntarily as a result of intimidation by the trial court judge. Specifically, Petitioner contends that the trial judge "chided [Petitioner] not to claim he was innocent even before defense counsel announced he would plead guilty,..." (§ 2254 Petition, attached P. 1). In Ground 3 of his petition, Petitioner alleges that he pled guilty involuntarily as a result of the trial court's insistence that Petitioner continue with the plea hearing

[1]The claims raised in Petitioner's petition track those raised in his appeal almost exactly (§ 2254 Petition; Respondent's Exh. 4). The Court notes that on appeal, however, Petitioner raised only claims of error on the part of the post-conviction court in not affording him a hearing on his 24.035 motion (Respondent's Exh. 4, PP. 9-11). Therefore, the underlying substantive claims raised in the instant petition are all procedurally defaulted for failure to raise on direct or post-conviction appeal. In an abundance of caution, however, the Court will continue to address the underlying claims considered by the Missouri Court of Appeals on the merits.

even after he announced his desire to go to trial. *Id.*

A review of the record shows that Petitioner did not raise these claims on direct appeal[2] or in his post-conviction motion[3] (Respondent's Exh. 2). A claim must be presented at each step of the judicial process in state court to avoid procedural default. *Jolly v. Gammon*, 28 F.3d 51, 53 (8th Cir.) (citing *Benson v. State*, 611 S.W.2d 538, 541 (Mo. Ct. App. 1980), cert. denied, 513 U.S. 983 (1994). Because Petitioner failed to raise these claims on direct appeal or in his post-conviction motion, the claims are defaulted and Petitioner is procedurally barred from pursuing the claims in a federal habeas proceeding. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); *Forest v. Delo*, 52 F.3d 716, 719 (8th Cir. 1995); *Keithley*, 43 F.3d at 1217. Therefore, this Court cannot reach the merits of the claims absent a showing of cause and prejudice or a demonstration "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

In his petition, Petitioner asserts neither cause for nor prejudice resulting from the procedural default. In addition, because Petitioner makes no claim of actual innocence, he cannot satisfy the "fundamental miscarriage of justice" exception to the required showing of cause and prejudice. *Schlup v. Delo*, 513 U.S. 298 (1995); *Washington v. Delo*, 51 F.3d 756, 761 (8th Cir.), cert. denied, 516 U.S. 876 (1995). Therefore, Petitioner's claims of relief raised in Grounds 2 and 3 of the instant petition are procedurally barred and will be denied.

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[2]Petitioner did not file a direct appeal form his convictions and sentence (Respondent's Exh. 3).

[3]Although Petitioner attempted to raise the claims in his appeal of the denial of his post-conviction relief motion, the Missouri Court of Appeals refused to address the claims because they were procedurally barred (Respondent's Exh. 6, attached PP. 4-5).

IV. Claims Addressed on the Merits

A. Ground 1

In Ground 1 of his petition, Petitioner asserts that he plead guilty involuntarily as a result of his fear of going to trial with unprepared counsel (§ 2254 Petition, attached PP. 1-8). Petitioner raised this claim on appeal,[4] and the Missouri Court of Appeals denied the claim as follows:

> Mr. Koste contends that the motion court erred in not conducting an evidentiary hearing to determine whether his guilty plea was voluntary. In support of this contention, Mr. Koste claims that: (1) he pled guilty due to his fear of going to trial with unprepared counsel, which deprived him of due process and effective assistance of counsel; (2) he was intimidated by the motion judge into pleading guilty because the judge told him not to claim that he "didn't do anything" even before his counsel announced his decision to plead guilty; and (3) the motion judge continued with the plea hearing after Mr. Koste announced his desire to go to trial. We consider only Mr. Koste's claim that his plea was involuntarily entered due to ineffective assistance of counsel. As Mr. Koste failed to include the other allegations of error in his motion for post-conviction relief, he is procedurally barred from raising them on appeal. Rule 24.035(d); *Yoakum v. State*, 849 S.W.2d 685, 689 (Mo.App., W.D. 1993).
>
> The motion court determined that counsel was

[4] As noted above, Petitioner raised this claim on appeal only in the context of his claim of motion court error in not granting an evidentiary hearing.

not ineffective without conducting an evidentiary hearing. Our review is limited to whether that court clearly erred. Rule 24.035(k). After reviewing the record, we conclude that the motion court's finding was not clearly erroneous. During the guilty plea proceeding Mr. Koste stated under oath that he was entering a plea of guilty of his own free will. Mr. Koste, however, did express dissatisfaction with his trial counsel. Specifically, Mr. Koste claimed that his counsel: (1) did not spend sufficient time to discuss his case; (2) disagreed with him as to which witnesses to call at trial; and (3) maintained a conflict of interest with him. We consider only Mr. Koste's claim that his counsel did not spend sufficient time with him because his other allegations are procedurally waived as they were not included in his motion for postconviction relief. Rule 24.035(d).

The record refutes Mr. Koste's allegation that his trial counsel did not sufficiently discuss his case with him. In his motion for post-conviction relief, Mr. Koste states that "[his trial] counsel met with him once about five minutes before trial." The motion court expressly found that Mr. Koste and his counsel had sufficient time–significantly more time than the five minutes alleged by Mr. Koste–to discuss his case: "The Court herein finds that– I stayed here last night myself to afford you an opportunity to spend two or three hours with your lawyer; that I had brought you to Court early so you could be with your lawyer.," Mr. Koste did not dispute this finding. The court further observed and Mr. Koste acknowledged that his counsel visited him while he was in the penitentiary. Because the record clearly refutes Mr. Koste's contention that his trial counsel did not spend sufficient time with him to prepare his case, the

> trial court did not clearly err in denying Mr. Koste's request for an evidentiary hearing on these allegations. Point I denied.

(Respondent's Exh. 6, PP. 4-6).

With respect to federal court review of state-court conclusions, 28 U.S.C. § 2254 states in relevant part as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–. . .
>
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Upon review of the record, this Court finds that the Missouri Court of Appeals' decision was not based on an unreasonable determination of the facts in light of the evidence presented. Petitioner's first claim for relief will therefore be denied.

B. <u>Ground 4</u>

In his fourth claim for relief, Petitioner asserts that he received ineffective assistance of counsel, in that counsel failed to pursue a mental evaluation of Petitioner (§ 2254 Petition, attached PP. 9-13). Petitioner raised this claim before the

Missouri Court of Appeals'[5], which addressed the claim as follows:

> Mr. Koste also claims that the motion court erred in failing to conduct a hearing to determine whether his trial counsel refused to pursue a mental evaluation. Mr. Koste claims that had such an evaluation been concluded, it would have revealed that he suffers from multiple personally disorder. Mr. Koste filed a *pro se* motion for a mental evaluation in this case on November 1, 1994.
>
> After reviewing the files and the record, we conclude that there is nothing to suggest that Mr. Koste's counsel was aware or should have been aware of any mental defect of Mr. Koste. "In the absence of some warning sign or suggestion of mental aberration there is no absolute or routine duty on counsel to initiate an independent investigation of the mental condition of an accused." *Ketcherside v. State*, 842 S.W.2d 182, 183 (Mo.App., E.D. 1992). During the plea hearing, the court required as to Mr. Koste's mental condition.
>
> THE COURT: You're not crazy?
>
> DEFENDANT: Not that I know of.
>
> THE COURT: You know what you're doing?
>
> DEFENDANT: Yeah.

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[5]As noted above, Petitioner raised this claim on appeal only in the context of his claim of motion court error in not granting an evidentiary hearing.

THE COURT: Okay, how far did you go in school?

DEFENDANT: Eleventh grade.

THE COURT: Do you know what the word voluntary mean (sic)?

DEFENDANT: Yes, sir.

THE COURT: Are you freely and voluntarily entering your plea of guilty? That's a yes or no.

DEFENDANT: Yes.

THE COURT: Okay. You're not under the influence of drugs or alcohol at this time?

DEFENDANT: No, sir.

THE COURT: You know what you're doing?

DEFENDANT: Yes.

In his motion for post-conviction relief, Mr. Koste simply noted that "[t]rial counsel was ineffective for failing to have (sic) psychiatric [examination of] movant. Movant has a multiple personality disorder that counsel should have known about and investigated." However, Mr. Koste never said or did anything at his guilty plea hearing that would have caused the judge or his trial counsel to suspect that he suffered from multiple

> personality disorder or any other mental disease. Moreover, Mr. Koste does not claim that he ever requested his trial counsel to obtain a mental evaluation to determine whether he suffered from multiple personality disorder. In fact, he does not even claim that his trial counsel knew or should have known that he filed a *pro se* motion for a mental evaluation. Under these circumstances, the motion court did not clearly err in denying Mr. Koste's request for an evidentiary hearing on this matter. *See, e.g., Warren v. State*, 740 S.W.2d 251, 253 (Mo.App., E.D. 1987); *Ginnery v. State*, 645 S.W.2d 202, 203 (Mo.App., W.D. 1998); *Sweazea v. State*, 588 S.W.2d 244, 246 (Mo.App., E.D. 1979). Point II denied.

(Respondent's Exh. 6, PP. 6-7).

With respect to federal court review of state court conclusions, 28 U.S.C. § 2254 states in relevant part as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Upon review, this Court finds that the opinion of the Missouri Court of Appeals did not result in a decision contrary to clearly established federal law. Further, a

review of the record does not reveal that the Missouri Court of Appeals' decision was based on an unreasonable determination of the facts in light of the evidence presented. Petitioner's fourth claim for relief will therefore be denied.

C. Ground 5

In his fifth claim for relief, Petitioner asserts that he received ineffective assistance of counsel, in that counsel was acting under a conflict of interest during his guilty plea proceeding (§ 2254 Petition, attached PP. 14-19). Petitioner raised this claim before the Missouri Court of Appeals[6], which addressed the claim as follows:

> Mr. Koste lastly argues that the trial judge erred in refusing to conduct a hearing to determine whether he had a conflict of interest with his trial counsel. Mr. Koste alleges that his trial counsel had a conflict of interest based on Mr. Koste's challenge to the effectiveness of her counsel in another proceeding. Mr. Koste has failed to allege facts showing how his defense was prejudiced and his plea was rendered involuntary due to the alleged actions or inaction of his trial counsel because of the alleged conflict of interest. Instead, Mr. Koste argues that the alleged conflict caused his counsel to inadequately prepare for trial and also deprived him of conflict-free advice. These conclusory assertions do not show how the matters complained of resulted in prejudice to his interests. The motion court did not clearly err in denying Mr. Koste an evidentiary hearing on these allegations because the record conclusively

[6]As noted above, Petitioner raised this claim on appeal only in the context of his claim of motion court error in not granting an evidentiary hearing.

> establishes that his plea was knowingly and voluntarily entered and that he did not meet his initial burden of pleading facts, not conclusions, not refuted by the record which entitle him to relief. Point III denied.

(Respondent's Exh. 6, PP. 7-8).

As stated above, with respect to federal court review of state court conclusions 28 U.S.C. § 2254 states in relevant part as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–. . .
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Upon review, this Court finds that the opinion of the Missouri Court of Appeals was not based on an unreasonable determination of the facts in light of the evidence presented. Petitioner's fifth claim for relief will therefore be denied.

CONCLUSION

IT IS HEREBY ORDERED that Petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (Doc. No. 6) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner's claims are **DISMISSED** with prejudice. A separate Order of Dismissal will accompany this Memorandum and Order.

IT IS FURTHER ORDERED that the Court will issue a partial certificate of appealability pursuant to 28 U.S.C. § 2253 because several issues deserve further proceedings. A separate Certificate of Appealability will accompany this Memorandum and Order.

Dated this 25th day of September, 2000.

Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION TWO

JAMES KOSTE,	)	No. 71817
	)	
Defendant/Appellant,	)	Appeal from the Circuit Court of
	)	the City of St. Louis
vs.	)	
	)	Hon. Daniel Tillman
STATE OF MISSOURI,	)	
	)	
Plaintiff/Respondent.	)	FILED: January 13, 1998

ORDER

Before Kathianne Knaup Crane, P.J., Mary Rhodes Russell, J., and James R. Dowd, J.

PER CURIAM

Defendant pled guilty to five counts of sodomy of a child under age fourteen in violation of section 566.060 RSMo 1994. Defendant was convicted as a persistent offender and sentenced to thirty years' imprisonment on each count, to run concurrently. Following his conviction, defendant filed a motion for post-conviction relief pursuant to Rule 24.035. Defendant now appeals the motion court's denial of his motion without an evidentiary hearing.

The judgment of the trial court is based on findings of fact that are not clearly erroneous. No error of law appears. A written opinion would have no precedential value. However, we have provided the parties with a memorandum, for their information only, setting forth our reasoning.

The judgment of the trial court is affirmed pursuant to Rule 84.16(b).

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION TWO

JAMES KOSTE,	)	No. 71817
	)	
Defendant/Appellant,	)	Appeal from the Circuit Court of
	)	the City of St. Louis
vs.	)	
	)	Hon. Daniel Tillman
STATE OF MISSOURI,	)	
	)	
Plaintiff/Respondent.	)	FILED: January 13, 1998

Before Kathianne Knaup Crane, P.J., Mary Rhodes Russell, J., and James R. Dowd, J.

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED- OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR, OR TRANSFER TO THE SUPREME

COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Defendant James Koste was convicted of five counts of sodomizing his daughter, a child under age fourteen, in violation of Section 566.060, RSMo 1994. Mr. Koste entered a guilty plea to these charges before the Circuit Court of the City of St. Louis. Following his guilty plea, Mr. Koste was sentenced to thirty years' imprisonment on each count, to run concurrently with a previous life sentence he received after he was convicted of rape and sodomy. Mr. Koste filed a timely motion to vacate his conviction under Rule 24.035, alleging that his guilty plea was involuntary. The motion court denied the motion without conducting an evidentiary hearing. Mr. Koste now appeals from the motion court's denial.

On May 24, 1994 Mr. Koste was charged as a prior offender by indictment with five counts of sodomy of a child under age fourteen in violation of section 566.060, RSMo 1994. A substitute information in lieu of indictment was filed on November 13, 1995, charging Mr. Koste as a persistent sexual offender with five counts of sodomy of a child under age fourteen. After a jury was selected and his trial was about to commence, Mr. Koste decided to plead guilty. Terri Johnson, who represented Mr. Koste at trial, entered a guilty plea on his behalf. At the time of his plea, Mr. Koste had another post-conviction proceeding pending in which he challenged the effectiveness of Ms. Johnson's counsel in another case.

After finding that Mr. Koste had freely and voluntarily pled guilty, the prosecutor recited the factual basis for the charges against Mr. Koste and the court questioned Mr. Koste as to these charges:

MS. McCARTNEY: Your honor, all of the

State's witnesses are available, through their testimony the State would prove beyond a reasonable doubt in count I that between January 1, 1994 and February 21, 1994 in the city of St. Louis, State of Missouri, the defendant had deviate sexual intercourse with Dana Koste to whom the defendant was not married and who was then less than fourteen years of age.

The deviate sexual intercourse consisted of the defendant putting his penis in the victim's mouth.

[The remaining counts are identical and have been omitted].

The State would also prove beyond a reasonable doubt that the defendant is a persistent sexual offender and punishable by sentence to an extended term of imprisonment under section [558.018] and [557.036.4]. He's a prior offender under section [558.019] as well.

In that the defendant has pleaded guilty to or has been found guilty of rape of a child less than fourteen years of age on September 26, 1992 in the Circuit Court of the City of St. Louis.

THE COURT: Did you hear the prosecutor make those statements?

DEFENDANT: Yes.

THE COURT: Were you there and did you commit those acts?

DEFENDANT: Yes.

THE COURT:	Now, you are admitting that you committed those acts?
DEFENDANT:	Yes, sir.
THE COURT:	The Court finds the defendant admitted sufficient facts to constitute the violation.

The court subsequently sentenced Mr. Koste as a persistent sexual offender to thirty years of imprisonment on each of the five counts, to be served concurrently. The court then informed Mr. Koste of his rights under Rule 24.035, and asked him if he was satisfied with Ms. Johnson's representation. Mr. Koste responded that he was not satisfied with Ms. Johnson and stated that he believed a conflict of interest existed between them due to his post-conviction proceeding challenging her effectiveness in a separate proceeding. In addition, Mr. Koste cited a dispute with Ms. Johnson as to which witnesses would be called in the case. The court found that there was no probable cause for ineffective assistance of counsel.

Mr. Koste subsequently filed a motion to vacate his conviction under Rule 24.035. The motion court denied the motion without conducting an evidentiary hearing. Mr. Koste appeals the denial of his motion, raising three points of error. Mr. Koste alleges that the motion court erred in refusing to conduct a hearing to determine whether: (1) his guilty plea was made voluntarily, (2) his counsel failed to pursue a mental evaluation, and (3) he had a conflict of interest with his trial counsel. We affirm.

A movant is entitled to an evidentiary hearing on a Rule 24.035 motion if: (1) the movant alleges facts, not conclusions, warranting relief; (2) the facts alleged raise matters not refuted

by the files and records in the case; and (3) the matters complained of have resulted in prejudice to movant's defense. *Broyles v. State*, 785 S.W.2d 685, 687 (Mo.App., E.D. 1990). Appellate review of the denial of a post-conviction motion is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. Rule 24.035(k); *Leisure v. State*, 828 S.W.2d 872, 873-74 (Mo.banc), *cert. denied*, 506 U.S. 923 (1992); *Leisure*, 828 S.W.2d at 874; *Tolen*, 934 S.W.2d at 641.

I. Voluntary Guilty Plea

Mr. Koste contends that the motion court erred in not conducting an evidentiary hearing to determine whether his guilty plea was voluntary. In support of this contention, Mr. Koste claims that: (1) he pled guilty due to his fear of going to trial with unprepared counsel, which deprived him of due process and effective assistance of counsel; (2) he was intimidated by the motion judge into pleading guilty because the judge told him not to claim that he "didn't do anything" even before his counsel announced his decision to plead guilty; and (3) the motion judge continued with the plea hearing after Mr. Koste announced his desire to go to trial. We consider only Mr. Koste's claim that his plea was involuntarily entered due to ineffective assistance of counsel. As Mr. Koste failed to include the other allegations of error in his motion for post-conviction relief, he is procedurally barred from raising them on appeal. Rule 24.035(d); *Yoakum v. State*, 849 S.W.2d 685, 689 (Mo.App., W.D. 1993).

The motion court determined that counsel was not ineffective without conducting an evidentiary hearing. Our review is limited to whether that court clearly erred. Rule 24.035(k). After reviewing the record, we conclude that the motion court's finding was not clearly erroneous. During the guilty plea proceeding Mr. Koste stated under oath that he was

entering a plea of guilty of his own free will. Mr. Koste, however, did express dissatisfaction with his trial counsel. Specifically, Mr. Koste claimed that his counsel: (1) did not spend sufficient time to discuss his case; (2) disagreed with him as to which witnesses to call at trial; and (3) maintained a conflict of interest with him. We consider only Mr. Koste's claim that his counsel did not spend sufficient time with him because his other allegations are procedurally waived as they were not included in his motion for post-conviction relief. Rule 24.035(d).

The record refutes Mr. Koste's allegation that his trial counsel did not sufficiently discuss his case with him. In his motion for post-conviction relief, Mr. Koste states that "[his trial] counsel met with him once about five minutes before trial." The motion court expressly found that Mr. Koste and his counsel had sufficient time–significantly more time than the five minutes alleged by Mr. Koste–to discuss his case. "The Court herein finds that–I stayed here last night myself to afford you an opportunity to spend two or three hours with your lawyer, that I had brought you to Court early so you could be with your lawyer." Mr. Koste did not dispute this finding. The court further observed and Mr. Koste acknowledged that his counsel visited him while he was in the penitentiary. Because the record clearly refutes Mr. Koste's contention that hist rial counsel did not spend sufficient time with him to prepare his case, the trial court did not clearly err in denying Mr. Koste's request for an evidentiary hearing on these allegations. Point I denied.

II. Mental Examination

Mr. Koste also claims that the motion court erred in failing to conduct a hearing to determine whether his trial counsel refused to pursue a mental evaluation. Mr. Koste claims that had such an evaluation been conducted, it would have

revealed that he suffers from multiple personality disorder. Mr. Koste filed a *pro se* motion for a mental evaluation in this case on November 1, 1994.

After reviewing the files and the record, we conclude that there is nothing to suggest that Mr. Koste's counsel was aware or should have been aware of any mental defect of Mr. Koste. "In the absence of some warning sign or suggestion of mental aberration there is no absolute or routine duty on counsel to initiate an independent investigation of the mental condition of an accused." *Ketcherside v. State*, 842 S.W.2d 182, 183 (Mo.App., E.D. 1992). During the plea hearing, the court inquired as to Mr. Koste's mental condition:

THE COURT:	You're not crazy?
DEFENDANT:	Not that I know of.
THE COURT:	You know what you're doing?
DEFENDANT:	Yeah.
THE COURT:	Okay, how far did you go in school?
DEFENDANT:	Eleventh grade.
THE COURT:	Do you know what the word voluntary mean (sic)?
DEFENDANT:	Yes, sir.
THE COURT:	Are you freely and voluntarily entering your plea of guilty? That's a yes or no.

DEFENDANT: Yes.

THE COURT: Okay. You're not under the influence of drugs or alcohol at this time?

DEFENDANT: No, sir.

THE COURT: You know what you're doing?

DEFENDANT: Yes.

In his motion for post-conviction relief, Mr. Koste simply noted that "[t]rial counsel was ineffective for failing to have (sic) psychiatric [examination of] movant. Movant has a multiple personality disorder that counsel should have known about and investigated." However, Mr. Koste never said or did anything at his guilty plea hearing that would have caused the judge or his trial counsel to suspect that he suffered from multiple personality disorder or any other mental disease. Moreover, Mr. Koste does not claim that he ever requested his trial counsel to obtain a mental evaluation to determine whether he suffered from multiple personality disorder. In fact, he does not even claim that his trial counsel knew or should have known that he filed a *pro se* motion for a mental evaluation. Under these circumstances, the motion court did not clearly err in denying Mr. Koste's request for an evidentiary hearing on this matter. *See, e.g., Warren v. State*, 740 S.W.2d 251, 253 (Mo.App., E.D. 1987); *Ginnery v. State*, 645 S.W.2d 202, 203 (Mo.App., S.D. 1983); *Sweazea v. State*, 588 S.W.2d 244, 246 (Mo.App., E.D. 1979). Point II denied.

III. Conflict of Interest

Mr. Koste lastly argues that the trial judge erred in

refusing to conduct a hearing to determine whether he had a conflict of interest with his trial counsel. Mr. Koste alleges that his trial counsel had a conflict of interest based on Mr. Koste's challenge to the effectiveness of her counsel in another proceeding. Mr. Koste has failed to allege facts showing how his defense was prejudiced and his plea was rendered involuntary due to the alleged actions or inactions of his trial counsel because of the alleged conflict of interest. Instead, Mr. Koste argues that the alleged conflict caused his counsel to inadequately prepare for trial and also deprived him of conflict-free advice. These conclusory assertions do not show how the matters complained of resulted in prejudice to his interests. The motion court did not clearly err in denying Mr. Koste an evidentiary hearing on these allegations because the record conclusively establishes that his plea was knowingly and voluntarily entered and that he did not meet his initial burden of pleading facts, not conclusions, not refuted by the record which entitled him to relief. Point III denied.

Affirmed.

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

JAMES KOSTE,	)	
	)	
Movant,	)	
	)	PCR No. 1473
vs.	)	
	)	Division No. 5
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

Movant was charged in Cause No. 941-01697 with five counts of sodomy of a child under 14. Movant pleaded guilty to all five counts and was sentenced to five concurrent terms of thirty years, with these sentences to run concurrent with a life sentence he was already serving in another cause. Movant filed his motion in the present cause pursuant to Rule 24.035 on December 18, 1995. Counsel was appointed to represent movant and an amended motion was filed on April 24, 1996. Having examined the records and files in this case, the Court now finds as follows:

FINDINGS OF FACT

1. Movant was represented at both plea and sentencing

by Terri Johnson, Attorney at Law.

2. The record reflects that movant decided to plead guilty after the jury for his trial had been selected (Tr. 2).

3. Movant testified that he had authorized his attorney to withdraw his not guilty pleas and to enter pleas of guilty to the charges (Tr. 2, 3).

4. The record reflects that movant was found to be a prior and persistent sexual offender on November 14, 1995.

5. The record reflects that movant was informed that he was being sentenced pursuant to § 558.016, and that the authorized term of imprisonment would be not less than thirty years (Tr. 9). Movant also testified that he was making his plea voluntarily without any threats (Tr. 3-4, 14).

6. Movant admitted the facts constituting the offenses as related by the Assistant Circuit Attorney were true and correct (Tr. 5-7). Movant testified that he was pleading guilty because he was guilty of committing the offenses to which he was pleading guilty (Tr. 3).

7. Movant testified that he was not under the influence of drugs or alcohol at the time of the plea (Tr. 4).

CONCLUSIONS OF LAW

1. Movant has requested an evidentiary hearing. To be entitled to an evidentiary hearing the movant must plead facts, not conclusions, which are not refuted by the record, which if true would entitle movant to relief, and the matters complained of must have resulted in prejudice. ***Tyler v. State***, 787 S.W.2d 778 (Mo.App. 1990); ***Glass v. State***, 772 S.W.2d 769 (Mo.App.

1989); ***Jones v. State***, 768 S.W.2d 672 (Mo.App. 1989); ***Green v. State***, 768 S.W.2d 661 (Mo.App. 1988). A movant is not entitled to a hearing where the motion, files and record of the case conclusively show that the movant is not entitled to relief. Rule 29.15(g); ***State v. Fraction***, 782 S.W.2d 764, 769 (Mo.App. 1989); ***Welch v. State***, 770 S.W.2d 441 (Mo.App. 1989). This Court has reviewed the files and transcripts in this case and finds that movant has failed to allege grounds that would entitle him to relief if true and that are not refuted by the record. Movant is therefore not entitled to an evidentiary hearing.

2. Movant's first allegation in his amended motion is that his guilty plea was induced by a fear of what would happen to him if he went to trial. This allegation is refuted by the record which reflects that the plea was voluntary, as well as by the terms of the offer; movant was already serving a life term and the sentences here were to run concurrent. Movant alleges his attorney failed to conduct a thorough investigation but has not alleged what information could have been discovered which would have provided a defense and has not named any witnesses who could have provided a defense. Also, a plea of guilty generally waives complaints about counsel's failure to investigate. ***Wilhite v. State***, 845 S.W.2d 592 (Mo.App. 1992); ***Fox v. State***, 819 S.W.2d 64, 66 (Mo.App. 1991); ***Naden v. State***, 773 S.W.2d 906 (Mo.App. 1989).

3. Movant next alleges his attorney was ineffective for failing to file a motion seeking a bill of particulars because the indictment alleged the crimes occurred during an eleven month period. This allegation is without merit. *See*, ***State v. Mills***, 872 S.W.2d 875 (Mo.App. 1994).

4. Movant alleges his attorney was ineffective for failing to seek a psychiatric examination of movant. In order to

be entitled to relief on this allegation movant must show the existence of a factual basis indicating that his mental condition was questionable which should have caused his attorney to initiate an independent investigation of movant's mental state. In the absence of some suggestion of mental instability there is no duty to initiate an investigation of the mental condition of an accused. Such an investigation is not indicated where a defendant has the present ability to consult with his attorney with rationality and to understand the proceedings against him. ***Garrett v. State***, 814 S.W.2d 325, 327-328 (Mo.App. 1991); ***State v. Powell***, 793 S.W.2d 505, 509 [11] (Mo.App. 1990). *See also* ***Ketcherside v. State***, 842 S.W.2d 182 (Mo.App. 1992). The record here reflects that movant was able fully able to understand the proceedings, and movant has alleged no facts which would have indicated to his attorney that his competency was at issue.[1]

5. The final allegation in the amended motion is that Rule 24.035 is unconstitutional. The post-conviction relief remedy time constraints are valid and mandatory. ***State v. Sumlin***, 915 S.W.2d 366, 371 (Mo.App., S.D. 1996); ***State v. Parker***, 886 S.W.2d 908, 929 (Mo.banc 1994); ***Smith v. State***, 798 S.W.2d 152 (Mo.banc 1990), cert. denied, 498 U.S. 973, 114 L.Ed.2d 127 (1991); ***Day v. State***, 770 S.W.2d 692, 695 (Mo.banc 1989), cert. denied sub nom., ***Walker v. State***, 493 U.S. 866, 107 L.Ed.2d 141, 110 S.Ct. 186 (1989).

6. Movant has incorporated by reference the allegations contained in his *pro se* motion. The first such allegation appears to be a claim that his rights were violated during the Rule

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[1]The Court notes that the file contains a *pro se* motion seeking a mental examination for the purpose of determining whether movant has a multiple personality disorder or other psychological defect, and asking that the State not have access to the results. The filing of this motion by movant does not indicate a lack of competency, but would seem to indicate the contrary.

29.07(b)(4) examination. This claim is without merit because the Rule 29.07(b)(4) hearing is not a critical stage of the criminal justice system. ***State v. Debler***, 856 S.W.2d 641, 652 (Mo.banc 1993). The Rule 29.07(b)(4) hearing does not violate movant's fifth and sixth amendment rights (against self-incrimination and to counsel) because the criminal case is over, and the examination neither compelled movant to testify against himself at a criminal trial nor denied him his right to remain silent. ***State v. Khoshaba***, 878 S.W.2d 472, 477-478 (Mo.App., E.D. 1994). The second allegation, that his attorney met with him only briefly and failed to investigate, was restated in the amended motion and need not be addressed again. The third and final *pro se* allegation appears to be a speedy trial claim: the alleged prejudice is that he could no longer challenge the competency of the victim. This claim is without merit because there is no speedy trial request or request for disposition of detainers in the court file, and movant's claim regarding the competency of the victim is conclusory; the claim was also rendered moot by the guilty pleas in which movant admitted under oath that he committed the crimes.

ORDER

Movant has the burden to establish by a preponderance of the evidence the basis on which he seeks to obtain relief. This Court has considered each allegation set forth in movant's Rule 24.035 Motion and finds that movant has failed to allege facts which, if true, would entitle him to relief.

THEREFORE, the Court orders, adjudges and decrees that Movant's request for a hearing is DENIED and that the Motion made pursuant to Supreme Court Rule 24.035 is DENIED.

SO ORDERED:

Daniel T. Tillman

Daniel T. Tillman, Judge

Dated: May 3, 1996

cc: S. Paige Canfield, Attorney for Movant
J. Christian Goeke, Assistant Circuit Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAMES KOSTE,	)	
	)	
Appellant/Petitioner,	)	
	)	
vs.	)	Case No. 00-3791
	)	
DAVE DORMIRE,	)	
	)	
Respondent/Appellee.	)	

PETITION FOR REHEARING OR REHEARING EN BANC

Comes now Respondent, by and through counsel and states as follows:

Petitioner for Rehearing En Banc

(A) The panel decision conflicts with a decision of the United States Supreme Court and decisions of this Court and consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

Williams v. Taylor, 529 U.S. 363, 412-413 (2000) (defining "contrary to" under 28 U.S.C. § 2254(d)(1) to mean reaching a conclusion opposite to that reached by the United States Supreme Court on a question of law or reaching a different result than the United States Supreme Court on "materially indistinguishable facts.")

Carpenter v. Lock, slip op. 99-4154 (8th Cir. July 17, 2001), 2001 U.S. App. LEXIS 15918 (finding "a state decision

must be 'mutually opposed' to clearly established Supreme Court precedent in order to satisfy the 'contrary to' clause").

Simmons v. Bowersox, 235 F.3d 1124, 1130 (8th Cir. 2001) (same).

Owsley v. Bowersox, 234 F.3d 1055, 1057-1058 (8th Cir. 2000) (rehearing denied McMilliian J. and R. Arnold J. dissenting) (certiorari pending) (finding ***Holloway v. Arkansas***, 435 U.S. 475 (1978) and ***Glasser v. United States***, 315 U.S. 680 (1942) were multiple representation cases that did not control complaints about a personality conflict between a defendant and his counsel and therefore relief was unavailable under 28 U.S.C. § 2254(d)(1) based on these cases).

(B) The proceeding involves the following question of exceptional importance.

Is the meaning of "contrary to" clearly established federal law as determined by the Supreme Court of the United States narrow, as ***Williams v. Taylor***; ***Carpenter v. Lock***; ***Simmons v. Bowersox*** and ***Owsley v. Bowersox*** indicate, or is it broad as the panel decision in this case indicates. This is a standard of review question that must be answered in a large number of federal habeas cases and could be outcome determinative in many. Further, the panel decision appears to create a broader standard of review than permitted by the United States Supreme Court in ***Williams v. Taylor***. This is an issue of general importance that may have to be resolved on certiorari review. If this Circuit wishes to permit broader habeas corpus review than is permitted by existing United States Supreme Court precedent, such a decision should be taken by the Court en banc.

Analysis

Petitioner Koste pled guilty to five counts of sodomy of

a child under fourteen and received the minimum sentences for those counts of five concurrent terms of thirty years imprisonment without the possibility of parole. ***Koste v. Dormire***, slip op. 00-3791 (August 13, 2001) at 2. Koste was already serving concurrent life sentences for rape of a child less than fourteen and sodomy of a child under fourteen that are not a subject of this litigation. Id. at 2.

Petitioner in writing before the guilty plea and orally, after the guilty plea in this case, alleged a conflict of interest with his guilty plea counsel because of a post-conviction review motion he had filed alleging a counsel's[1] ineffectiveness in his earlier rape and sodomy case in which he had also pled guilty. Id. at 4. The panel cited the following excerpt from the transcript which occurred after the guilty plea and sentence, as evidence the guilty plea court failed to make the required inquiry into the allegation of conflict.

> The court found that none exist[s]. The court found that we selected this jury, we let you listen to the tape, the video tape and it was not raised until this morning that I was informed that you had a suit against them, but you had filed a PCR. . . . The court is not going to try that PCR as being to legal suit against [the attorney] and the court herein denies that.

(Id., at 4, *citing* Tr. 14-15).

The panel concluded that a prejudicial conflict of interest

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[1]As pointed out infra in Petitioner's earlier case, he was represented by Al Lundt and Sherry Grunneger, not Terri Johnson, the attorney who represented him at guilty plea and sentencing in tihs case.

must be presumed and the failure to make such a presumption was "contrary to" ***Holloway v. Arkansas***, 435 U.S. 475 (1978) requiring habeas corpus relief under 28 U.S.C. § 2254(d) (Panel Opinion at 12-13).

This holding is in conflict with ***Williams v. Taylor***, 529 U.S. 363, 412-413 (2000) which defines "contrary to" clearly established law as determined by the United States Supreme Court as reaching a conclusion opposite to that of the United States Supreme Court on a question of law or reaching a different decision on materially indistinguishable facts. ***Simmons v. Bowersox***, 235 F.3d 1124, 1130 (8th Cir. 2001) and ***Carpenter v. Lock***, slip op. 0099-4154 (8th Cir. July 17, 2001) follow this holding finding a state court decision and a United States Supreme Court precedent must be "mutually opposed" for relief to be granted under the contrary to clause. In ***Owsley v. Bowersox***, 234 F.3d 1055, 1057-1058 (8th Cir. 2000), this Court specifically found that ***Holloway v. Arkansas*** did not control in a case of an alleged personal conflict between a defendant and an attorney because ***Holloway*** was a joint representation case and therefore habeas relief could not be granted under 28 U.S.C. § 2254(d).

Holloway v. Arkansas was a case in which one attorney was appointed to represent three codefendants, and the attorney as an officer of the court informed the court that because of confidential information received from the clients he was aware that they had conflicting interests. But the trial court declined to appoint separate counsel or even inquire into the matter. The holding in ***Holloway*** was that in light of counsel's pretrial representation as an officer of the court that his joint representation forced him to represent conflicting interests, the trial court had a duty to either inquire into the matter or appoint separate counsel. ***Holloway v. Arkansas***, 435 U.S. at 484.

In the case at bar, a criminal defendant not the attorney alleged a conflict existed because he had filed a post-conviction review motion in an earlier case, his previous rape and sodomy convictions, alleging ineffective assistance of counsel. This has nothing to do with the fact pattern in ***Holloway*** and is certainly not materially indistinguishable from it. There is not a practical way to plausibly distinguish away ***Williams***, ***Carpenter***, ***Simmons*** and ***Owsley***. They conflict with the result of this case.

Additionally, this is a guilty plea case not a representation of conflicting interests at trial case like ***Holloway***. In guilty plea cases involving an alleged conflict, this Court has appeared to treat a knowing, intelligent and voluntary plea as dispositive on an alleged conflict claim. ***See Blalock v. United States***, 977 F.2d 1255 (7th Cir. 1992); ***Gumegan v. United States***, 254 F.3d 701 (8th Cir. 2001).

In this case, after filing his written motion alleging conflict of interest, Petitioner pled guilty anyway. Koste told the court he was freely and voluntarily pleading guilty (G.P. Tr. 4; Petitioner's Addendum A16). This presents a waiver issue not present in ***Holloway***. Petitioner made a reasoned choice between alternatives to plead guilty despite his allegation of conflict. Such a situation is far removed from ***Holloway*** in which prejudice was presumed because counsel is an officer of the court told the court his defense at trial was hampered by representing defendants with conflicting interests, but the court declined to inquire.

Panel Rehearing

The underlying "conflict" alleged in Petitioner's appellate brief (being represented by the "same lawyer" against whom a PCR ineffectiveness claim was pending) and which formed the basis of relief, was not alleged to the guilty plea court

and never happened.

Petitioner's habeas petition alleged that he was denied conflict-free counsel "at the time of conviction and sentencing" because counsel "was involed [sic] in case 921-1150 whereas movant is claiming ineffectiveness of counsel."

Case 921-1150 was Petitioner's prior conviction for rape and sodomy for which he was sentenced to two terms of life in prison. He was initially granted probation on those convictions, but violated probation. The habeas corpus was denied in that case in ***Koste v. Dormire***, No. 4:97CV0093 (E.D. Mo.). Petitioner was represented by Robert Lundt and Sherry Grunnager in the earlier case, not Terri Johnson, the attorney at Koste's sodomy guilty plea and sentencing in this case. Lundt in fact withdrew from Petitioner's current case and was replaced by Terri Johnson on March 27, 1995[2] (Resp.Exh. 3, Supplemental Legal File P. 2). Review of Petitioner's PCR motion in the earlier case indicates Petitioner listed Lundt and Grunnager as the only attorneys in that earlier conviction and thus the only subjects of his PCR motion. *See* ***Koste v. Dormire***, 4:97CV0093, Exhibit 3 at 8, the PCR motion in the prior conviction.

Petitioner's written motion to remove counsel due to a conflict of interest in this case, to which he referred at the guilty plea hearing, did not allege that Terri Johnson had personally worked on his other case but rather complained about a conflict

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[2]Johnson came into the case after Lundt who had represented Petitioner earlier in the case withdrew. Lundt is the only attorney that the record reflects worked on both cases and he was long gone from the second case when Petitioner, represented by Johnson, pled guilty (*See* Resp.Exh. 3 at 2, Lundt withdraws on March 27, 1995 and is replaced by Johnson. Petitioner represented by Johnson pled guilty on November 14, 1995, Id. at 6).

with "agenced [sic] attorneys said office" (***Koste v. Dormire***, 98CV1709, Exhibit 3 at 44). As best Respondent can tell Petitioner in his written motion was alleging he had a conflict with the public defender's office and because his attorney was a public offender she could not represent him. The court properly found he had no conflict with counsel Johnson in the following post-plea colloquy:

> DEFENDANT: I do believe that my attorney and I are at a conflict of interest due to my appeal on my other case as I stated in my motion, and I refer to it.
>
> THE COURT: Okay. The Court found that none exist. The Court found that we selected this jury, we let you listen to the tape, the video tape and it was not raised until this morning that I was informed that you had a suit against them, but you had filed a PCR, is that correct?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: The Court is not going to try that PCR as being no legal suit against Ms. Johnson and the Court herein denies that.

(Petitioner's Appendix A26-27, A14-15).

Petitioner's brief to this Court repeatedly characterized Petitioner as asserting to the guilty plea court that the "same lawyer" had represented him in a separate case in which he alleged counsel's ineffectiveness (Petitioner's Brief at 6, 8 and 12).[3] A careful reading of the record reveals that this

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[3]This may be a fair inference from reading the *pro se* habeas petition in isolation without reading the record on which it was based. However, the *pro se* pleading to the district court is simply that, not a factual

characterization is simply wrong. Petitioner in a written motion, not particularly articulately, complained that because he had been represented by a public defender in an earlier case in which he alleged ineffectiveness, he had conflict with his current public defender. This is apparent from reviewing the written motion concerning conflict filed with the guilty plea court and reviewing the PCR motion in the earlier case which did not allege representation by Terri Johnson, or complain about her (The written motion alleging conflict is at Resp.Exh. 3 at 44-45 and is attached as an addendum to this pleading as are pertinent parts of the *pro se* PCR motion in the early criminal case which was part of Exhibit 1 in ***Koste v. Dormire***, 97 CV0083 (E.D. Mo.), the federal habeas action challenging the earlier rape and sodomy convictions).

Respondent and this Court appear to have briefed and decided the case based on a factual scenario which exists in Petitioner's brief but does not correspond to reality. Respondent prays this panel reconsider its decision in order to prevent a writ being granted based on Petitioner alleging to the guilty plea court that the "same counsel" was representing him at the guilty plea that had been alleged to have been ineffective in the earlier case when the individual counsel's were different and were not alleged to be the same to the guilty plea court.

Procedural Bar Analysis

The district court found all Petitioner's claims to be procedurally barred but addressed some of the claims in "an abundance of caution" (Memorand Opinion at 1, n. 1, Petitioner's Appendix A-5). Respondent in his brief and at oral

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record supporting the claim. The key documents are the written motion filed before the guilty plea hearing and the *pro se* PCR motion in the earlier case listing the names of counsel whose effectiveness was being challenged.

argument asserted a defense of procedural default on the claim on which relief was granted.[4]

Respondent's position with which the district court agreed was that the claim raised on the state post-conviction appeal was a federally noncognizable challenge to the denial of a post-conviction review evidentiary hearing, not a presentation of the legal theory raised in the habeas petition which was barred because it had not been fairly presented to the state court. The panel opinion does not appear to address the procedural default defense on this issue, and applies the analysis of the Missouri Court of Appeals on the post-conviction hearing issue to analysis of the habeas claim, which is not the same factual and legal issue the state appeals court was reviewing.

WHEREFORE, Respondent prays that rehearing en banc or by the panel be granted.

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[4]Counsel for Petitioner at oral argument denied Respondent's assertion that the district court had found the claim to be barred, but later recanted this position in a post-argument letter.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704
Post Office Box 899
Jefferson City, Mo 65102
(573) 751-3321

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing document has been mailed, postage prepaid, this 22nd day of August, 2001, to:

Howard B. Eisenberg
Post Office Box 1476
Milwaukee, Wisconsin 53201-1476
(414) 288-1768
FAX (414) 288-6413

_____
MICHAEL J. SPILLANE

IN THE COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

JAMES KOSTE,	)
	)
Movant,	) By:_____
	)
vs.	)
	)
STATE OF MISSOURI,	)
	)
Respondent.	)

MOTION OF CONFLICT OF INTERENCE [sic]

A conflict has been created between Movant and his attorney, due to Motion to Vacate, Set Aside or Correct Judgment and Sentence in Cause Number 921-1150 agenced [sic] attorneys said office. Therefore to proceed would force movant to make decitions without the advice of conflict-free counsel, thereby violating his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Movant never waived his right to counsel, yet is being forced to proceed *pro se* at this critical stage of the proceedings. Counsel is rendered ineffective by this conflict. Direct governmental interference with the right to counsel constitutes an actual or constructive denial of assistance of counsel. When there is a complete deprivation of conflict free counsel, prejudice is presumed. The state granted the right necessarily includes the to effective assistance of counsel. *See* ***Evitts v. Lucey***, 469 U.S. 387, 395 (1985). The state must "act in accord with the dictates of the Constitution and in particular, in accord with Due Process even where the state provides a discretionary right. To proceed *pro se* would now be involuntar [sic] on movants part, wherefore movant James Koste prays that this Court grant him reliefe [sic]

and that this Court sustain his motion.

Respectfully submitted,

James Koste
JAMES KOSTE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

JAMES ALAN KOSTE, SR.,	)	
Full name of Movant	)	
	)	_____
vs.	)	(To be supplied by the
	)	Clerk of the Circuit Court)
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

MOTION TO VACATE, SET ASIDE OR CORRECT THE JUDGMENT OR SENTENCE

INSTRUCTIONS-READ CAREFULLY:

In order for this motion to receive consideration by the Circuit Court, it shall be in writing (legibly handwritten or typewritten), signed by the movant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, movant may furnish his answer to a particular question on the reverse side of the page or an additional blank page. Movant shall make it clear to which question any such continued answer refers.

This motion must be filed in the Circuit Court which imposed sentence.

The movant is required to include in this motion every ground known to him for vacating, setting aside or correcting his conviction and sentence or it will be waived or abandoned. Be sure to include every ground.

Since every motion must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for making a false statement. Movants should therefore exercise care to assure that all answers are true and correct.

If the motion is taken in forma pauperis, it shall include an affidavit setting forth information that establishes that movant will be unable to pay costs of the proceedings. When the motion is completed, the original and two copies shall be mailed to the Clerk of the Circuit Court from which he was sentenced.

MOTION

1. Place of detention: F.R.D.C. Fulton, Mo. 652510190.

2. Name and location of court which imposed sentence: St. Louis City Circuit Court, 1320 Market Street, St. Louis, MO. 63103, Div. No. 8.

3. The case number and the offense or offenses for which sentence was imposed: 921-1150 Rape under 14 and Sodomy under 14.

4. The date upon which sentence was imposed and the terms of the sentence: August 12, 1994 life and life run concurrently.

5. Check whether a finding of guilty was made:

(a) After a plea of guilty _____.
(b) After a plea of not guilty _____

6. Did you appeal from the judgment of

conviction: No.

7. If you answered "yes" to (6), list
(a) the name of the court to which you appealed: N/A.

(b) the result in such court and the date of such result: N/A.

8. State concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence:

(a) Exesesave [sic] Punishment.
(b) Ineffective Counsel.

* * * *

16. If you answered "yes" to one or more parts of (15), list

(a) the name and address of each attorney who represented you:

i. Sherry Grunanger P.D. 1320 Market, St. Louis, MO. 63103

ii. Robert Lundt P.D. 1320 Market, St. Louis, Mo 63103.

iii.

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17. Are you now under sentence from any other court that you have not challenged? No.

18. If you are seeking leave to proceed in forma

pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes.

James Alan Koste, Sr.
Signature of Movant

STATE OF MISSOURI)
) ss
COUNTY OF ST. LOUIS)

I, James Alan Koste, Sr., movant in this case, being duly sworn upon my oath state that I have subscribed to the foregoing petition; that I know the contents thereof; that the above information is, to the best of my knowledge, true and correct, that I have listed every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that I understand that I waive any ground for relief known to me that I have not listed in this motion.

James Alan Koste, Sr.
Signature of Movant

SUBSCRIBED AND SWORN to before me this 27th day of October, 1994.

R-Moreland
Notary Public

My commission expires: 4-20-97.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 941-1697 J
	)	Div. No. 17
JAMES KOSTE,	)	
	)	
Defendant.	)	

Transcript of Oral Proceedings heard November 13, 1995, before the Honorable Daniel T. Tillman, Judge, Circuit Court, City of St. Louis, State of Missouri.

Margaret McCartney
Assistant Circuit Attorney for the State.

Terri Johnson,
Assistant Public Defender for the Defendant.

November 13, 1995:

THE COURT: Mr. Defendant, you know the State Legislature passed the victims impact statement, so they must go back and see if these people want to be present when you make your plea of guilty.

The Court is not going to let the little girl be present but the adults have the right to be present.

DEFENDANT: Am I allowed to make a statement before I enter my plea?

THE COURT: I ain't taking no Alpha plea.

DEFENDANT: I know that, Your Honor.

THE COURT: You can make a statement after your plea, but I am not listening to nothing before you plead.

Don't say nothing crazy like you didn't do nothing. The nine year old can't come in, I don't want the nine year old to hear it.

You're the grandmother, you can stay in.

Raise your right hand.

Do you swear the testimony you are about to impart to this Court to be the truth, nothing but the truth, so help you God.

DEFENDANT: I do.

THE COURT: You've got to speak loud enough for the court reporter to hear you now.

Okay, put your hand down. You understand we have selected the jury, they are ready, willing, and able to hear your case and decide it. You understand that?

DEFENDANT: Yes, sir.

THE COURT: You understand that you are

charged with five counts of sodomy?

DEFENDANT: Yes, sir.

THE COURT: And is there an announcement for the Court, Ms. Johnson.

MS. JOHNSON: Yes, Your Honor. At this time my client has authorized me to withdraw his former plea of not guilty and enter a plea of guilty pursuant to the negotiated plea bargain of thirty years without probation and parole concurrent with the life sentence that he's serving right now.

THE COURT: Did you hear your lawyer make that statement?

DEFENDANT: Yes.

THE COURT: Did you authorize her to make that statement?

DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty because you are guilty?

DEFENDANT: I will take the 5th on that, Your Honor.

THE COURT: I told you, Terri, I don't take Alpha pleas. He's got to tell me he did it.

DEFENDANT: I will plead guilty.

THE COURT: No, it's a difference between "I will plead guilty" and you committed it. Did you authorized her to plead you guilty? I am going to ask you whether or not you did some acts. You've got to tell me you did them, man, because I don't take Alpha pleas. You understand that?

DEFENDANT: I don't understand that, Your Honor.

THE COURT: Did you authorize Ms. Johnson to plead you guilty?

DEFENDANT: Yes, sir.

THE COURT: You are pleading guilty because you're guilty?

DEFENDANT: Yes.

THE COURT: Okay. Because if you don't I am going to let the jury decide it then. You will be facing consecutive time instead of concurrent time.

DEFENDANT: I ain't ever getting out any way, it doesn't matter.

THE COURT: Did anybody beat you or force you to plead guilty?

DEFENDANT: No.

THE COURT: You are doing this of your own free will?

DEFENDANT: Yes.

THE COURT: You're not crazy?

DEFENDANT: Not that I know of.

THE COURT: You know what you're doing?

DEFENDANT: Yeah.

THE COURT: Okay, how far did you go in school?

DEFENDANT: Eleventh grade.

THE COURT: Do you know what the word voluntary mean?

DEFENDANT: Yes, sir.

THE COURT: Are you freely and voluntarily entering your plea of guilty? That's a yes or no.

DEFENDANT: Yes.

THE COURT: Okay. You're not under the influence of drugs or alcohol at this time?

DEFENDANT: No, sir.

THE COURT: You know what you're doing?

DEFENDANT: Yes.

THE COURT: The Court accepts the plea of

guilty, finds it is freely and voluntarily made.

The prosecutor is going to make a statement then I am going to ask you some questions.

MS. McCARTNEY: Your Honor, all of the State's witnesses are available, through their testimony the State would prove beyond a reasonable doubt in count I that between January 1, 1994 and February 21, 1994 in the city of St. Louis, State of Missouri, the defendant had deviate sexual intercourse with Dana Koste to whom the defendant was not married and who was then less than fourteen years of age.

The deviate sexual intercourse consisted of the defendant putting his penis in the victim's mouth.

In count II the State would prove beyond a reasonable doubt that between January 1st, 1994 and February 21, 1994, in the City of St. Louis, State of Missouri, the defendant had deviate sexual intercourse with Dana Koste to whom the defendant was not married and who was less than fourteen years of age.

The deviate sexual intercourse consisted of James Koste putting his penis in Dana Koste's mouth. In count III the State would prove beyond a reasonable doubt that between January 1, 1994 and February 21, 1994, in the City of St. Louis, State of Missouri, the defendant had deviate sexual intercourse with Dana Koste to whom the defendant was not married and who was then less than fourteen years of age.

The deviate sexual intercourse consisted of James Koste putting his penis in Dana Koste's mouth. In count

IV the State would prove beyond a reasonable doubt that between January the 1st of 1994 and February 21, 1994, in the City of St. Louis, State of Missouri, the defendant had deviate sexual intercourse with Dana Koste to whom the defendant was not married and who was less than fourteen years of age.

The deviate sexual intercourse consisted of James Koste putting his penis in Dana Koste's mouth. In count V the State would prove beyond a reasonable doubt that between January 1, 1994 and February 21, 1994, in the city of St. Louis, State of Missouri the defendant had deviate sexual intercourse with Dana Koste to whom the defendant was not married and who was less than fourteen years of age.

The deviate sexual intercourse – I'm sorry, the deviate sexual intercourse consisted of James Koste putting his penis in Dana Koste's mouth.

The State would also prove beyond a reasonable doubt that the defendant is a persistent sexual offender and punishable by sentence to an extended term of imprisonment under section 558018 and 557036.4. He's prior offender under section 558019 as well.

In that the defendant has pleaded guilty to or has been found guilty of rape of a child less than fourteen years of age on September 26, 1992 in the Circuit Court of the City of St. Louis.

THE COURT: Did you hear the prosecutor make those statements?

DEFENDANT: Yes.

THE COURT: Were you there and did you commit those acts?

DEFENDANT: Yes.

THE COURT: Now, you are admitting that you committed those acts?

DEFENDANT: Yes, sir.

THE COURT: The Court finds the defendant admitted sufficient facts to constitute the violation.

As to count I, is there any legal reason why sentence shouldn't be imposed at this time?

MS. JOHNSON: No, Your Honor.

THE COURT: Hearing none, the Court herein sentences the defendant to thirty years in the department of corrections pursuant to the – what section?

MS. McCARTNEY: Are you asking about the sentence without probation and parole provision?

THE COURT: What is the section on without probation and parole?

MS. McCARTNEY: I believe 557036.4, Your Honor. But I would like to check and make sure.

THE COURT: 557 —

MS. McCARTNEY: 036.4.

THE COURT: I've got it here.

MS. McCARTNEY: And actually I think that's a typographical error, Your Honor. It should be 558 I believe.

THE COURT: I've got the wrong book again. Go back there and get me 7.

MS. JOHNSON: Is that 7 there?

THE COURT: Yeah, this is 7. 5 5 what?

MS. McCARTNEY: 558036.4 I'm not sure if it's 558 or 557. My indictment has 557.

MS. JOHNSON: 558 5589 is – no, that's something else .

MS. McCARTNEY: Try 557036.

THE COURT: 557 –

MS. McCARTNEY: Yeah.

THE COURT: 557 –

MS. McCARTNEY: 036.

THE COURT: 556036?

MS. McCARTNEY: 557036.

MS. JOHNSON: Informed of the penalty.

MS. McCARTNEY: Point 4.

THE COURT: If the defendant is found to be a prior offender, persistent offender – as defined in section 558016.

MS. JOHNSON: Is there a persistent sexual offender listed there?

THE COURT: No.

MS. McCARTNEY: Then 558016.

THE COURT: Extended term. This is what you want.

MS. McCARTNEY: Yes.

THE COURT: You are being sentenced pursuant to section 558.016. The Court having found you to be a prior offender – no, it's 558.018, persistent sexual offender defines it. The Court shall sentence a person who has pleaded guilty to or been found guilty of a felony of forcible rape, statutory rape, forcible sodomy, statutory sodomy, an attempt to commit any of the aforesaid to an extended time of imprisonment if found the defendant to be a persistent sexual offender.

Persistent sexual offender is one who has previously pled guilty or been found guilty of a felony of forcible rape, statutory rape in the first degree, forcible sodomy, statutory sodomy in the first degree, attempt to commit any of the aforesaid for one found to be a persistent sex offender shall be not less than thirty year which term shall be served without probation and parole. That's the section you are looking for?

MS. McCARTNEY: That's the section, Your Honor. Could you state for me again what the number is so I can have it corrected?

THE COURT: 558.18.

MS. McCARTNEY: Okay. That's listed in the indictment, Your Honor.

THE COURT: Okay. The Court herein finds the defendant having been found guilty of a prior sexual offense to be within that section to be subject to being sentenced as a persistent sexual offender.

The Court sentences the defendant to thirty years in the department of correction without probation or parole.

As to count II, any legal reason why sentence shouldn't be imposed?

MS. JOHNSON: No, Your Honor.

THE COURT: Hearing none, it is the sentence and judgment of this Court that you are sentenced to thirty years without probation and parole to be served concurrently with the thirty years on count I.

As to count II, any legal reason why sentence shouldn't be imposed at this time?

MS. JOHNSON: No, Your Honor.

THE COURT: Hearing none, it is the sentence and judgment of this Court that you be sentenced to thirty years

in the department of corrections without probation and parole to be served concurrently with the thirty years on counts II and I.

As to count IV, is there any legal reason at this time why sentence shouldn't be imposed?

DEFENDANT: No.

THE COURT: Hearing none, it is the sentence and judgment of this Court that you are sentenced to thirty years in the department of corrections without probation and parole to be served concurrently with the thirty years on counts III, II, and I.

As to count V, is there any legal reason why sentence shouldn't be imposed?

MS. JOHNSON: No, Your Honor.

THE COURT: Hearing none it is the sentence and judgment of this Court that you are sentenced to thirty years in the department of corrections without probation and parole. Any and all jail time to be allowed, the sentence to be served concurrently with the sentence imposed on counts IV, III, II, and I, and concurrent with the sentence he is now serving under cause number –

MS. JOHNSON: 921-1150.

THE COURT: 921-1150.

Do you have any money to pay court costs?

DEFENDANT: No, sir.

THE COURT: The Court herein waives court costs. The Court enters a judgment against the defendant for sixty eight dollars in favor of the victims compensation fund. I can't waive that, son.

DEFENDANT: I understand that, Your Honor.

THE COURT: Okay, Mr. Koste, it is my duty to read to you your rights from this point forward. Under Rule 24.035 you have a right to file motion to correct your conviction or sentence if you claim that it violates the Constitution of this State or the Constitution of the United States, or this Court was without jurisdiction to impose the sentence, or the sentence imposed was in excess of the maximum sentence authorized by law, that a verified criminal procedure form 40 needs to be filed within ninety days after you are delivered to the department of corrections or you waive your right under this rule.

If you are indigent and file your own motion no cost deposit is required, an attorney will be appointed for you. Do you understand what I have just told you?

DEFENDANT: Yes, sir.

THE COURT: Do you have any questions concerning that?

DEFENDANT: No, sir, Your Honor.

THE COURT: Your attorney in this matter is Ms. Terri Johnson. Did your attorney represent you throughout this proceeding?

DEFENDANT: She did represent me, Your

Honor.

THE COURT: Have you had sufficient time to discuss your case with your attorney prior to pleading guilty?

DEFENDANT: I don't feel so, Your Honor.

THE COURT: Okay. The Court herein finds that -- I stayed here last night myself to afford you an opportunity to spend two or three hours with your lawyer; that I had brought you to Court early so you could be with your lawyer.

Your lawyer indicated to me in your presence that she visited you at jail once. You were returned from the penitentiary, is that right?

DEFENDANT: One time for five minutes, Your Honor.

THE COURT: Okay. The Court finds that you have had sufficient time to discuss your case with your lawyer and I was here this morning at 9 o'clock.

Did your attorney do everything you asked her to do?

DEFENDANT: No.

THE COURT: Okay. Did you give her any names or addresses of any witnesses?

DEFENDANT: Yes, sir.

THE COURT: Ms. Johnson, I saw your investigator talking to you. Did you order things done for this

man on his behalf this morning?

MS. JOHNSON: Yes, Your Honor. But, Mr. Koste was having a dispute as to what witnesses would be called in this case.

THE COURT: I am not going to get involved in the trial technique strategy, all I want to know -- I saw your investigator in the court room and you were giving him some directions.

MS. JOHNSON: That's correct, Your Honor.

THE COURT: Other than the plea bargaining, did your attorney make any threats or promises to get you to enter your plea of guilty?

DEFENDANT: No, sir.

THE COURT: Are you satisfied with your attorney?

DEFENDANT: No, sir.

THE COURT: Anything else you want to tell me about your lawyer before I decide whether I believe you received effective assistance of counsel?

DEFENDANT: Yes, sir.

THE COURT: Go ahead.

DEFENDANT: I do believe that my attorney and I are at a conflict of interest due to my appeal or my other case as I stated in my motion, and I refer to it.

THE COURT: Okay. The Court found that none exist. The Court found that we selected this jury, we let you listen to the tape, the video tape and it was not raised until this morning that I was informed that you had a suit against them, but you had filed a PCR, is that correct?

DEFENDANT: Yes, sir.

THE COURT: The Court is not going to try that PCR as being no legal suit against Ms. Johnson and the Court herein denies that.

Anything further?

MS. JOHNSON: No, Your Honor.

THE COURT: Anything else you want to say?

DEFENDANT: I feel due to the fact that you are not adhering to – my due process rights have been denied me. Other than that I have no statement, Your Honor.

THE COURT: What did you say about due process was denied you?

DEFENDANT: Yes, sir.

THE COURT: Okay. The Court has been fair and impartial to you. I don't care what happens to your case, I will remain that way. And I treat every defendant that comes before me that way. I didn't omit any facts, man, so you have to live with your conscience, man. The only thing about it is I worry more about what trauma you left with your daughter than anything else because she went through two traumatic things with you. So you've got to live with your conscience and she's

got to try to get her life straightened out.

> The Court finds there's no probable cause for ineffective assistance of counsel. Ms. Johnson has tried a number of cases in this division, she's been trying cases a number of years and the Court has always found her to be a diligent attorney, and I so find.
>
> Is there anything else?

MS. JOHNSON: No, Your Honor.

THE COURT: Okay, son, I can't say good luck to you because you made your bed hard, you've got to lay in it, man. I will grant you leave to appeal as a poor person or whatever it is, because anything that I might do I want it reviewed. You understand that?

DEFENDANT: Yes, sir, I do.

THE COURT: So file and do whatever you have to do, okay.

DEFENDANT: Your Honor, I would ask that I be writted back as soon as possible.

THE COURT: Okay, Mr. Johnson, prepare a memo, he's to be returned to the penitentiary forthwith.

MS. JOHNSON: I will, Your Honor.

THE COURT: Anything else?

DEFENDANT: Your Honor, I would like to go on the record stating that the only reason I didn't proceed is

because I couldn't hurt my family anymore.

THE COURT: I was watching your reaction when that young lady was on the video. I didn't look at the video on purpose because I didn't want to see it so I wouldn't be prejudiced against you. But I was watching your reaction, and I indicated to your lawyer if you reacted like that before the jury it was going to hurt your case.

Did I not so state, Ms. Johnson?

MS. JOHNSON: You didn't, Your Honor.

THE COURT: Because I didn't just start doing this, this is my twenty seventh year doing this. And I treat everybody the same. Lot's of people don't agree with it but I don't ask them to agree with it.

As long as I am consistent and treat you like I treat everybody else I can go home and go to sleep. You understand that?

DEFENDANT: Yes, sir.

THE COURT: I hope that you and your family will eventually reconcile. I don't want you to have anything to do with that nine year old, okay.

DEFENDANT: Am I restricted not to talk to my other children?

THE COURT: Are they here? If they're not down here I can't do it.

DEFENDANT: I thought in the future.

THE COURT: Oh, yeah, in the future you can if somebody in the family brings them to see you you can.

I am going to direct them not to bring the nine year old.

Okay, anything else you want to say? Okay, put him up.

SPEAKER: Can I say something to James.

As a stepson I still love you, I just hate what you did to Dana; and your dad does love you despite what you did.

DEFENDANT: Just words, Linda.

SPEAKER: No, they're not words.

DEFENDANT: Can I go, Your Honor?

THE COURT: Okay, go back and get those witnesses and bring them all out here, the nine year old too.

Right there, you can lay your stuff up there.

Okay, young lady, I wanted you brought out so that I can talk to you. You have had some traumatic things to happen to you in your life. I am going to direct the Circuit Attorney to make available to you some counseling so that you will be able to deal with the enormous burden that's been placed on you.

I want you to make sure that you go to your counseling and attempt to eradicate from your mind the tragic things that happened to you.

You understand that?

VICTIM: Yes, sir.

THE COURT: This doesn't mean that you're a bad person, I don't want you feeling that way, just some bad things happened to you.

You have a loving grandmother and whoever has been taking care of you have done remarkable job. You're a very beautiful young lady and I want you to go through life feeling good about yourself. You understand that?

VICTIM: Yes, sir.

THE COURT: You promise the old judge you are going to do that?

VICTIM: Uh huh.

THE COURT: And make all of your counseling and listen to the counselors and see if they can help you.

The other family members, you have been exposed to some tragic things, wipe it out of your mind. Gather around this young lady and see if she can't get her life back. Good luck to you.

VICTIM: Thank you.

THE COURT: Okay, bring the jury up.

SPEAKER: I would like to thank the Judge, thank

you.

THE COURT: Okay.

CERTIFICATE

I, Thelma L. Clark, Official Reporter for Division 5 of the 22nd Judicial Circuit of Missouri, at St. Louis, do hereby certify that I appeared at the time and place first hereinbefore set forth, and I took down in shorthand the entire proceedings had in the within-entitled cause, and that the foregoing pages constitute a true, correct, and complete transcript of my shorthand notes of said proceedings.

_____

Official Court Reporter
22nd Judicial Circuit

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Supreme Ct.
FILED
JAN 14 2002
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IN THE
SUPREME COURT OF THE UNITED STATES

Case Number 01-948

DAVE DORMIRE, *Superintendent,*
Jefferson City Correctional Center

Petitioner,

vs.

JAMES KOSTE,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, James Koste, in accordance with Rule 39 of this Court, respectfully moves the Court to proceed in forma pauperis, and in support thereof states as follows:

1. He is an indigent inmate of the Jefferson City Correctional Center, Jefferson City, Missouri.

2. He was granted in forma pauperis status by the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit, and the Court of Appeals appointed the undersigned attorney to represent Respondent on appeal pursuant to the provisions of the Criminal Justice Act of 1964, as amended.

For these reasons, James Koste respectfully moves the Court for leave to file

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17 pp

the attached Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit without the filing of costs and to proceed in forma pauperis before this Court.

Dated January 12, 2002

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

Case Number 01-948

* * * * *

IN THE

SUPREME COURT OF THE UNITED STATES

DAVE DORMIRE, *Superintendent,*
Jefferson City Correctional Center

Petitioner,

vs.

JAMES KOSTE,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Case Number 01-948

* * * * *

IN THE

SUPREME COURT OF THE UNITED STATES

DAVE DORMIRE, *Superintendent,*
Jefferson City Correctional Center

Petitioner,

vs.

JAMES KOSTE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT PROPERLY APPLIED LONG ESTABLISHED SUPREME COURT PRECEDENT IN A MANNER THAT DOES NOT CONFLICT WITH ANY OTHER CIRCUIT. PETITIONER ASKS THIS COURT TO DECIDE AN ISSUE NOT RAISED BY THIS CASE.

The law has long been clear that when a potential conflict of interest is brought to the attention of the trial court, the court must either assure that conflict free counsel is provided or take other steps to adequately inquire into the conflict. If the court takes neither action, prejudice to the defendant will be

presumed and the defendant is entitled to automatic reversal. *Holloway v. Arkansas*, 435 U.S. 475, 484-491 (1978). For the purpose of 28 U.S.C. §2254(d), the rule of *Holloway* is clearly established federal law as determined by this Court. *See, Campbell v. Rice*, 265 F.3d 878, 889-890 (9th Cir. 2001); *Atley v. Ault*, 191 F.3d 865, 868-871 (8th Cir. 1999).

Petitioner is simply wrong when he argues that the "automatic reversal" rule of *Holloway* is limited to cases in which the defense attorney is representing multiple defendants. In *Wood v. Georgia*, 450 U.S. 1 (1981) this Court itself applied *Holloway* and *Cuyler v. Sullivan*, 446 U.S. 335 (1980) to a conflict that did *not* involve a single lawyer who represented multiple defendants in the same case. In *Wood* the conflict was between the criminal defendant and his employer who paid defense counsel. The employer was not a defendant at all. Nevertheless, the Court applied the *Cuyler* reasoning[1] to a case which did not involve multiple representation of codefendants. The Court said:

> Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest. *E.g., Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978). Here, petitioners were represented by their employer's lawyer, who may not have pursued their interests single-mindedly. It was his duty originally at sentencing and later at the revocation hearing, to seek to convince the court to be lenient. On the record before us, we cannot be sure whether counsel was influenced in his basic strategic

---

[1] *Cuyler* was applied, rather than *Holloway*, because the potential conflict was not raised in the trial court. Indeed, it was never raised in *any* Court, including the U.S. Supreme Court, and the lawyer who had the potential conflict actually argued the case in the Supreme Court. *See Wood*, 450 U.S. at 266 n. 8 and 450 U.S. at 275-276 (White, J., *dissenting*).

> decisions by the interests of the employer who hired him. If this was the case, the due process rights of petitioners were not respected at the revocation hearing, or at earlier stages of the proceedings below.

Woods v. Georgia, 450 U.S. at 271-272.

It is thus apparent that long before this case was tried, this Court had made clear that the rule of *Holloway* applied to any case in which defense counsel had a conflict which prevented him or her from pursing the defendant's "interest single-mindedly." The courts of appeal have understood that the rule of *Holloway* applies to a variety of conflicts of interest in addition to the situation in which a single lawyer represented codefendants with conflicting interests. The circuits have applied *Holloway* to situations in which a defendant's counsel owes conflicting duties to that defendant and some other third person. *United States v. Soto Hernandez*, 849 F.2d 1325, 1328 (10th Cir. 1988), or when the interests of the defendant conflict with those of the lawyer. *See, Solina v. United States*, 709 F.2d 160, 167-169 (2nd Cir. 1983); *Walberg v. Israel*, 706 F.2d 1071, 1075 (7th Cir. 1985). *See also, Campbell v. Rice, supra.* and *Atley v. Ault, supra.*

At page 8 of the certiorari petition, the Superintendent cites several cases which he says conflicts with the Eighth Circuit's decision in this case. That is not true. In fact, none of the cases are factually or legally in the same posture as this case. This case involves the "automatic reversal" rule of *Holloway v. Arkansas*, not the issue of what standard is applied when a defendant raised the conflict-of-interest question on appeal or in post-conviction proceedings for the first time. The automatic rule of *Holloway* applies when: (1) the conflict is brought to the trial

court's attention prior to conviction; and (2) the trial court makes no inquiry. None of the cases cited by Petitioner meet the two prerequisites of *Holloway*.

Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995) (*en banc*); *United States v. O'Neil*, 118 F.3d 65 (2nd Cir. 1997); and *United States v. Moree*, 220 F.3d 65 (2nd Cir. 2000), are not *Holloway* cases at all. In these cases the attorneys' alleged conflicts were not brought to the attention of the trial court until after conviction, thus taking the case entirely out of the "automatic reversal" rule of *Holloway*. In such cases, it might well be that the two prong requirement of *Strickland v. Washington*, 466 U.S. 668 (1984) applies to such post-conviction review, but such issue is simply not raised by this case.

United States v. White, 174 F.3d 290, 294-297 (2nd Cir. 1999) was a *Holloway* case, but one in which the trial court made the required inquiry when informed of the conflict by the defendant. Similarly, in *United States v. Barnes*, 990 F.2d 1426, 1438 (4th Cir. 1993) the trial court made an inquiry and denied the defendant's request for the appointment of new counsel when the defendant claimed his attorney had a conflict of interest because the defendant himself had filed a bar complaint against his own attorney. Again, if there is an inquiry by the trial court, *Holloway* does not require automatic reversal and a different standard is applied. But the question of what standard applies to those circumstances is not raised by this case.

In the final case cited by Petitioner, *Hale v. Gibson*, 227 F.3d 1298 (10th Cir. 1995), although it is not clear whether either of the requirements of *Holloway* were

met, the Court of Appeals found that no conflict of interest ever existed. Additionally, it appears that the conflict of interest issue was raised for the first time on habeas corpus appeal. Again, that is a very different procedural posture than in the instant case.

Petitioner asks this Court to decide an issue which is not presented by this case, namely what standard is applied when the requirements of *Holloway* are *not* met, but the defendant claims after conviction that his lawyer had a conflict of interest. Simply stated, that issue is not presented by Mr. Koste's case, and this case does not provide an appropriate vehicle for this Court's consideration of the question presented by Petitioner.

II. GIVEN THE MANNER IN WHICH THE STATE COURT ACCEPTED RESPONDENT'S PLEA OF GUILTY, GRANTING CERTIORARI IN THIS CASE IS INAPPROPRIATE.

Even if the issue presented by Petitioner is properly raised by this case, this case is an inappropriate vehicle for deciding such issue. Due to the idiosyncratic manner in which the state circuit judge conducted the plea colloquy and sentencing, several of Respondent's constitutional rights were violated in addition to his right to conflict free counsel. Although these issues were not reached by the Court of Appeals, the record as a whole precludes the Court from deciding the issue presented by the Superintendent because of the overall defects in the record.

The guilty plea and sentencing occurred on the same day in this case, but Petitioner makes virtually no reference to the manner in which the state circuit

judge conducted the plea colloquy and sentencing. The indictment in Respondent's case charged five identical crimes. The statute violated is the same, the victim is the same, and the dates of the offense are the same in every count. The prosecution and defense had agreed that Respondent would plead guilty in return for a sentence to run concurrently with a sentence Mr. Koste was then serving. At the beginning of the hearing, Respondent asked permission to make a statement:

DEFENDANT: Am I allowed to make a statement before I enter my plea?

THE COURT: I ain't taking no Alpha[2] plea.

DEFENDANT: I know that, Your Honor.

THE COURT: You can make a statement after your plea, but I am not listening to nothing before you plead.

Don't say nothing crazy like you didn't do nothing.

(Petitioner's Appendix at 69).

The judge then continued with the plea colloquy, but when Mr. Koste failed to admit that he had committed the crime, the Judge became angry, and the following colloquy ensured:

THE COURT: Are you pleading guilty because you are guilty?

DEFENDANT: I will take the 5th on that, Your Honor.

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[2] Respondent assumes that "Alpha plea" refers to an "Alford plea," in which the defendant pleads guilty, while denying that he committed the offense. *See, North Carolina v. Alford*, 400 U.S. 25 (1970).

THE COURT: I told you, Terri[3], I don't take Alpha pleas. He's got to tell me he did it.

DEFENDANT: I will plead guilty.

THE COURT: No, it's a difference between "I will plead guilty" and you committed it. Did you authorized (*sic*)her to plea you guilty? I am going to ask you whether or not you did some acts. You got to tell me you did them, man, because I don't take Alpha pleas. You understand that?

DEFENDANT: I don't understand that, Your Honor.

THE COURT: Did you authorize Ms. Johnson to plead you guilty?

DEFENDANT: Yes, sir.

THE COURT: You are pleading guilty because you're guilty.

DEFENDANT: Yes.

COURT: Okay. Because if you don't I am going to let the jury decide it then. You will be facing consecutive time instead of concurrent time.

(Appendix 70-71).

The prosecutor then made a statement to the court which constituted the factual basis for the plea (*Appendix* 73-74). The statements were identical for each count of the indictment. The prosecutor read the charges in the indictment and added the fact that the "sodomy" consisted of the Respondent putting his penis in the victim's mouth. Neither the specific age of the victim, the specific dates of the offenses, nor the specific places the crimes took place were supplied. The Respondent then said he heard the prosecutor and that he committed those

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[3] The Court was apparently addressing defense counsel, Terri Johnson.

offenses. At no time did anyone inform the Respondent of the constitutional rights he was giving up by pleading guilty, the maximum penalties for the crimes, or the elements of the offenses. The circuit court utterly failed to comply with the plea procedure specified in Missouri Supreme Court Rule 24.02(b).[4]

In short, the plea proceedings are facially defective. The plea proceedings did not comply with the State Court rule or the constitutional requirements mandated by *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). In *Boykin* this Court found reversible error when a trial judge accepted a defendant's guilty plea without creating a record affirmatively showing that the plea was knowing and voluntary. 395 U.S. at 242. In *Boykin* this Court specified three constitutional rights--the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers--which a defendant must waive before entering

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[4] This Rule States:

Advice to Defendant. Except as provided by Rule 31.03, before accepting a plea of guilty, the court must address the defendant personally in open court, and inform him of, and determine that he understands, the following:

1. The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

2. If the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceedings against him and, if necessary, one will be appointed to represent him; and

3. That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

4. That if he pleads guilty there will not be a further trial of any kind, so that by pleading guilty he waives the right to a trial.

a constitutionally valid plea of guilty. Waiver of these rights could not be presumed from a silent record. In this case, none of those constitutional rights were mentioned by the court or counsel, much less waived by Respondent. There is no showing that the plea was voluntary or that there was even a factual basis for the plea. Indeed, the comments of the judge ("...if you don't [plead guilty] I am going to let the jury decide it then. You will be facing consecutive time instead of concurrent time.") might well be understood as threat of a more severe sentence if the Respondent refused to plead guilty.

The Eighth Circuit found it unnecessary to consider the obvious constitutional issues raised by this record, instead focusing on the state court's failure to inquire into the conflict of interest brought to its attention by Respondent.

After accepting the plea and sentencing Respondent to 30 years in prison, the state circuit judge, as required by Missouri Supreme Court Rule 29.07(b)(4), asked Mr. Koste whether he was satisfied with his lawyer. The Respondent told the state judge that he was not satisfied with his appointed counsel and that he had a conflict of interest with his lawyer because Respondent had filed a post conviction petition (PCR) in another case alleging that this same lawyer had provided constitutionally ineffective representation (Appendix 82). Respondent said that previously he had filed a motion objecting to the continuation of his appointed attorney due to this conflict, *id.* That motion was never acted upon by the circuit court. In response to this statement the judge said:

> The Court is not going to try that PCR as being no legal suit against Ms. Johnson [defense counsel] and the Court herein denies that.

(Appendix 83). Koste responded by expressing the belief that the state trial judge was denying him Due Process of Law. *Id.*

It is plain from the foregoing that the state judge was not willing to listen to *anything* Mr. Koste had to say except that he was guilty as charged. Of course, the judge offered Koste the option of going to trial, where he would be facing a consecutive sentence. In the coercive atmosphere of these proceedings, the failure of the state judge to inquire into the conflict between the Respondent and his lawyer is just one of several rather obvious constitutional defects in the plea and sentencing proceedings. The issue the Petitioner wants this Court to review can not be separated from the other issues which are presented by this record. Considering the nature of the record as a whole, certiorari review of the issue raised by Petitioner is not appropriate.

CONCLUSION

For all of the foregoing reasons, the instant petition should be denied.

Respectfully submitted,

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No. 01-948

IN THE
SUPREME COURT OF THE UNITED STATES

DAVE DORMIRE,
Superintendent,
Jefferson City Correctional Center

Petitioner,

vs.

JAMES KOSTE,

Respondent.

On Petition for Writ of Certiorari to the United States of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I. **The decision of the Court below that a conviction must be automatically reversed without any showing of prejudice in a case in which a criminal defendant has alleged a conflict based on his own accusations that counsel was ineffective in an earlier case is contrary to the decisions of this Court and other circuit courts of appeals.**

II. **The decision of the court below interpreting the "contrary to" language of 28 U.S.C. §2254(d)(1) is in compatible with the decision of this Court in *Williams v. Taylor*, 529 U.S. 362 (2001) after similar confusion and threatens to sow the confusion concerning the standard of review to be used in habeas cases that was eliminated by this Court in the *Williams v. Taylor* decision.**

Respondent essentially makes three arguments against granting certiorari in this case. These are the following:

1) *Wood v. Georgia*, 450 U.S. 1 (1981) was a case in which this Court applied *Holloway v. Arkansas*, 435 U.S. 75 (1978) and *Cuyler v. Sullivan*, 446 U.S. 335 (1980) in a context other than joint representation. Therefore it was permissible for the court below to grant a writ of habeas corpus requiring automatic reversal of a conviction without prejudice analysis in a case of an alleged personal conflict between an attorney and client.

2) The cases cited by Petitioner to show a conflict between the circuits, involved holdings that the decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) concerning conflicts of interest does not apply to cases of a personal conflict between an attorney and client. These cases therefore do not stand for the proposition that the *Holloway* automatic reversal

rule does not apply to such cases.

3) Even if a conflict between the Circuit Courts of Appeals does exist, this is not the proper case to resolve it because Respondent alleges his guilty plea should be overturned for reasons not relied on by the court below.

None of these arguments are persuasive. The arguments do not negate the conflict between the circuits or demonstrate that this is not the appropriate case to resolve the conflict.

1. *Wood v. Georgia*, 450 U.S. 1 (1981) was a case in which the operators of an allegedly criminal enterprise, who were never identified, provided legal representation in a criminal case for their low level employees. This representation in practice produced a strategy that benefited the employers by creating a constitutional test case, rather than attempting to keep the nominal clients out of jail. This Court in *Wood* did not automatically reverse the convictions of the defendants or even reverse the revocations of their probations but rather remanded the case for analysis by a trial court on the issue of whether an actual conflict existed, even though the trial court had known that counsel had been provided by the employer and pressed a constitutional attack rather than arguing for leniency.

Further, *Wood* is much closer to a multiple representation case than to a case involving a personal conflict with counsel. The attorneys in *Wood* did in fact arguably represent the employer and the criminal defendants, although the employer was never identified and therefore never charged. *Wood* does not create clearly established federal law that supported granting a writ of habeas corpus requiring automatic reversal in this case based on the "contrary to" clause of 28 U.S.C. §2254(d)(1).

2. Respondent's argument that the cases cited by Petitioner do not point out a conflict is not logical. *Holloway v. Arkansas*, 435 U.S. 75 (1978) sets out a rule for when an alleged conflict of interest, of the type discussed in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), is not investigated by the trial court even though it is brought to the court's attention prior to trial. The holdings of several circuit courts of appeals that *Strickland v. Washington*, 466 U.S. 668 (1984) not *Cuyler v. Arkansas* applies to the type of personal disputes between counsel and client that are the subject of this case also means that *Holloway* does not apply. *Holloway* cases are simply a subset of *Cuyler* cases in which an independent investigation of a known allegation of a conflict was not made prior to trial. If there is no *Cuyler* conflict there is necessarily no way to apply *Holloway* to the fact pattern. Therefore the decision of the court below that it was contrary to *Holloway* to require a showing of prejudice in a case in which a personal conflict with counsel was alleged, but not investigated prior to a plea, does conflict with the cases from other circuit courts of appeals holding *Strickland* not *Cuyler* must be used in analyzing claims of personal conflict. The decision in this case is in conflict with the cases cited in the certiorari petition (Certiorari Petition at 9).

3. Respondent argues that he believes his guilty plea colloquy was deficient and therefore this is not the proper case to resolve a conflict between the circuit courts of appeals on whether automatic reversal is required by failure of a guilty plea court to investigate an alleged personal conflict between an attorney and a criminal defendant. The matters Respondent complains about were not the basis of the decision of the court below nor would these issues be relevant to merits review by this Court on the issues on which the United States Court of Appeals for the Eighth Circuit granted relief. A habeas petitioner as a practical matter can always allege additional error occurred on which relief was not

granted. This contention is not material to the fact that the issue that was decided by the court below creates a conflict between the circuit courts of appeals which can be decisively resolved on the facts of this case.

Conclusion

The petition for certiorari should be granted.

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